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FEDERAL ANTITRUST DECREES: SHOULD THEY BE GIVEN CONCLUSIVE EFFECT IN A SUBSEQUENT PRIVATE ACTION?

*Martin C. McWilliams, Jr.**

The antitrust statutory scheme embodies the policies of, *inter alia*, deterrence of anticompetitive activity[1] and prompt settlement of antitrust actions,[2] the latter policy paralleling a general policy of judicial economy. One element of the scheme, once expected to be highly potent,[3] is the treble damage feature of civil liability actions against convicted antitrust offenders.[4] Despite the high hopes of courts and commentators,[5] the treble damage action has been of limited effectiveness in compensating victims of antitrust violations,[6] deterring illegal activity,[7] or encouraging speedy resolution of antitrust actions.[8] The cost and delay of private litigation, resulting from the horrendous complexity[9] of antitrust litigation, discourage many private plaintiffs who are either unable or unwilling to commit the requisite resources to vindicate their legal rights.[10] Such factors also mitigate the impact of the treble damage provision by encouraging plaintiffs to settle cheaply,[11] or by allowing offenders years-long, interest-free use of their illegal gains.[12]

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* Law Clerk to Judge Robert Ainsworth, U.S. Court of Appeals; B.A. 1969, University of Virginia; J.D. 1975, University of Mississippi; LL.M. 1976, Harvard.

[1] *See* 1955 U.S. CODE CONG. & ADMIN. NEWS 2328, 2329.

[2] *See, e.g.*, City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th Cir. 1964).

[3] *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951).

[4] Clayton Act §§ 4, 5(a), 5(b), 15 U.S.C. §§ 15, 16(a), 16(b) (1970).

[5] For years courts have joined antitrust attorneys in espousing the importance of treble-damage actions for achieving adequate antitrust enforcement and for compensating victims of antitrust violations. Their assertions, however, lack empirical support.

Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1319 (1973) (footnote omitted), *citing* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968); Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317-18 (1965).

[6] *See* Wheeler, *supra* note 5, at 1337-40.

[7] *See id.* at 1321-37.

[8] *See, e.g.*, Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329, 344 (1974).

[9] *See* Wheeler, *supra* note 5, at 1331.

[10] *See id.* at 1332.

[11] *See id.*

[12] *See id.* at 1321-22.

This weakness in the antitrust enforcement policy is paralleled by the impact of civil damage suits on the notoriously overcrowded federal trial dockets.[13] Such suits consume judicial resources through exhaustive litigation of complex issues and often require multiple litigation of the same issues—initially in federal enforcement actions and subsequently in private civil damage suits. The quantity of complex litigation could be reduced substantially and antitrust policy implemented by giving *conclusive* effect to government antitrust actions when the same issues arise in subsequent private actions. Given the demise of mutuality as an inflexible rule of common law collateral estoppel, antitrust defendants who fully and fairly litigate issues against the government should be estopped from relitigating those issues in subsequent treble damage actions. However, two main obstacles lie in the path of such use of collateral estoppel: (1) Does section 5(a) of the Clayton Act, which gives prima facie weight in private actions to issues litigated in government actions, preclude application of common law estoppel principles? The answer should be that section 5(a) is not preemptive: The drafters of the Clayton Act intended to allow the private plaintiff to make the most preclusive possible use of prior government action. Thus, when appropriate, the judiciary should be free to rely on the common law for a more preclusive mechanism.[14] (2) Given that some government actions are tried without juries, would giving conclusive effect to resulting decrees deprive antitrust defendants of a seventh amendment right to argue those issues to a jury in a subsequent treble damage action? Since there is no seventh amendment right to relitigate issues to another trier of fact when those issues are fully aired in a separate, adversarial action, the logical answer is "no."[15] Indeed, the author submits that even Federal Trade Commission decrees, despite their administrative nature, should be accorded similar estoppel effect.[16]

I. Offensive Use of Collateral Estoppel by a Nonparty

A. *The Demise of Mutuality of Estoppel*

In its classic formulation, collateral estoppel provides that issues[17] once settled in court between parties[18] may not be relitigated in a differ-

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[13] *See* note 153 *infra*.

[14] See section *B infra*.

[15] See section *C infra*.

[16] See section *D infra*.

[17] Collateral estoppel differs from res judicata in that the latter extends to "not only all matters pleaded, but to all that might have been," while collateral estoppel extends only to issues actually litigated and necessary to the decision. Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926).

[18] [A]s a general proposition, one who invokes the conclusive effect of a judg-

ent action.[19] The elements of collateral estoppel have been stated as follows:

> Where there is a second action between [the same] parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.[20]

The policies underlying the collateral estoppel doctrine include "stability and finality in the judicial process"[21] or "repose,"[22] and judicial economy.[23] Courts, litigants, and the public are the intended beneficiaries of these policies.[24] The reach of the doctrine is, however, limited by due process.[25]

The requirement of mutuality of estoppel—that only parties to the former action or their privies can be bound—has been substantially eroded,[26] particularly in the federal courts.[27] A major reason for this

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ment must have been either a party or one in privity with a party in the suit in which one judgment was rendered.

Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 302 (1961); *see, e.g.*, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.44a[2], at 3775-80 (2d ed. 1948); Semmel, *Collateral Estoppel, Mutuality, and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459-61 (1968); Comment, *Nonparties and Preclusion By Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098 (1968).

[19] Res judicata, by which all issues are estopped, see note 17 *supra*, contemplates identity of cause of action. Collateral estoppel contemplates separate actions, hence the identity of issue rule. 1B J. MOORE, *supra* note 18, ¶ 0.441[1], at 3771-74.

[20] 1B J. MOORE, *supra* note 18, ¶ 0.441[2], at 3777; *see, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); RESTATEMENT OF JUDGMENTS §§ 68, 93 (1942).

[21] 64 COLUM. L. REV. 1141, 1141 (1964).

[22] Comment, *supra* note 18, at 1098-99; *see, e.g.*, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892, 894; 52 CORNELL L.Q. 724 (1967); 43 G.W.L. REV. 814, 820 (1975).

[23] Comment, *supra* note 18, at 1098-99 & n.10.

[24] *See id.* at 1099.

[25] *E.g.*, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892, 894 (1942); *cf.* Hansberry v. Lee, 311 U.S. 32, 42 (1940).

[26] *E.g.*, Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965); Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892, 895 (1942) ("The courts of most jurisdictions have . . . accomplished . . . broad exception[s] to the requirements of mutuality . . . .").

Bernhard accelerated the erosion which the exceptions had begun. Regarding post-*Bernhard*, accelerated erosion, see B.R. DeWitt, Inc. v. Hall, 10 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967) (mutuality a "dead letter"); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

[27] *See, e.g.*, Graves v. Associated Transport, Inc., 344 F.2d 894, 900 (4th Cir. 1965);

erosion is that strict application of the mutuality requirement "subverts the policy goals of collateral estoppel"[28] by requiring that courts afford "a disappointed litigant the opportunity to continue disputing" facts already judicially determined.[29]

The leading case in the demise of mutuality is *Bernhard v. Bank of America.*[30] Noting the policies underlying collateral estoppel[31] and that due process limits the operation of the doctrine,[32] Judge Traynor observed:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted . . . . There is no compelling reason . . . for requiring that the party asserting the plea . . . must have been a party . . . to the earlier litigation.
>
> No satisfactory rationalization has been advanced for the requirement of mutuality.[33]

Mutuality, however, has been defended on two general grounds. First, under the dispute-settlement model of the lawsuit—"in personam jurisprudence"[34]—strangers to a judgment cannot be bound thereby.[35] This argument, however, appears to have given way to an increasingly administrative concept of jurisprudence favoring finality, judicial economy, and reduction of litigation costs.[36] Thus, the notion of enjoying a day in court against each *party* has given way to that of a day in court on each *issue,* consistent, of course, with due process of law.[37]

The second general defense of mutuality involves the consideration

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Zdonak v. Glidden, 327 F.2d 944, 954-55 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964); United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-26 (E.D. Wash., D. Nev. 1962), *aff'd as to estoppel sub nom.,* United States Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

[28] 52 CORNELL L.Q. 724, 724-25 (1967); *see* 43 G.W.L. REV. 814, 818 & nn.25-27 (1975).

[29] 1964 DUKE L.J. 402, 404-05.

[30] 19 Cal. 2d 807, 122 P.2d 892 (1942); *see* Currie, *supra* note 26.

[31] 122 P.2d at 894.

[32] *Id.*

[33] *Id.* at 894-95. *See generally,* Currie, *supra* note 26.

[34] Moore & Currier, *supra* note 18, at 301.

[35] *See, e.g.,* Seavy, *Res Judicata with Reference to Persons Neither Parties Nor Privies—Two California Cases,* 57 HARV. L. REV. 98, 99 (1943); Von Moschzisker, *Res Judicata,* 38 YALE L.J. 299, 303 (1929).

[36] Not coincidentally, these factors reflect the policies of collateral estoppel, a doctrine which expanded at the expense of the strict adversary model, see notes 23 & 28 *supra,* as it became clear that mechanisms other than mutuality could promote due process, see notes 83 through 89 and accompanying text *infra.*

[37] 1964 DUKE L.J. 402, 404-05.

of fairness.[38] For example, fairness may be denied a party who, for whatever reason, fails to vigorously prosecute an issue and later finds that issue foreclosed to him in an unexpected subsequent action.[39] On the other hand, unfairness may also result when a multiple-action defendant is subjected to repeated litigation of an issue until he is defeated on it and is thereafter foreclosed from litigating the issue against remaining members of the plaintiff class.[40] In this context, the "fairness" argument may be recast in due process terms[41] and thus serve to limit the use of collateral estoppel *sans* mutuality.[42] Because fairness is a subjective concept determined by the circumstances of each case, it need not be ensured by an objective, hard-and-fast rule. Thus, if a party could not be expected to foresee subsequent actions raising identical issues,[43] or if decisions in prior actions run both for and against a litigant on a particular issue,[44] estoppel should not be invoked.[45] Clearly, the result would depend upon a particularized inquiry into the fullness and fairness of the prior litigation of the issue.[46]

As previously noted, due process concepts limit the application of collateral estoppel. Generally, only parties to the prior action and their privies[47] can be bound by a judgment rendered therein.[48] Beyond privity,

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[38] Moore & Currier, *supra* note 18, at 310; *see* The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

[39] 64 COLUM. L. REV. 1141, 1146-47 (1964).

[40] Moore & Currier, *supra* note 18, at 310-11. This is the "multiple claimant anomaly," introduced by Professor Currie, see Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957), and later recognized by him not to bar estoppel *sans* mutuality, but to be a factor in whether to apply such mutuality, see Currie, *supra* note 26, at 27.

[41] Due process standards in general are not hard and fast, but are particularized to suit the individual case. *See* Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1497-98 (1974); *cf.* Hansberry v. Lee, 311 U.S. 32, 40 (1949); Comment, *supra* note 18, at 1104-05.

[42] *E.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); Teitlebaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). See notes 85 through 87 and accompanying text *infra*.

[43] *See* Semmel, *supra* note 18, at 1464.

[44] *See id.* at 1466.

[45] *See* Currie, *supra* note 26.

[46] "[T]he mutuality rule is deservedly dead, and . . . any reservations about the totality of its demise should rest on particularized inquiry rather than on rules of thumb . . . ." *Id.* at 31. *See, e.g.*, Semmel, *supra* note 18, at 1468; 64 COLUM. L. REV. 1141, 1144 (1964).

[47] *See, e.g.*, Note, *supra* note 41, at 1497. See note 18 *supra*.

[48] *E.g.*, Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918); *see* Note,

the question of fairness to nonparties becomes one of

> [f]irst, to what extent did the nonparty participate in or control the prior action; second, to what extent can the issue be said to have been fully and fairly litigated in a manner which protects the interests of the nonparty.[49]

Applying this manner of analysis, due process has been found to allow, for example, estoppel of privies and those who are virtual representatives.[50]

B. The Offensive-Defensive Distinction

Recognizing that mutuality is largely a "dead letter"[51] in the law of estoppel, the important consideration becomes the extent to which a litigant may assert collateral estoppel deriving from an action to which he was not a party against one who was a party. Although mutuality is no longer generally required when estoppel is invoked by a defendant, its abandonment is often said to be less justifiable when the estoppel is sponsored by a plaintiff.[52] The federal courts, however, have shown a willingness to employ offensive estoppel following an inquiry into the fairness of the litigation which settled the putatively estopped issue.[53] They appear correct in assuming that offensive estoppel is as justifiable as defensive estoppel in the proper circumstances.[54]

Critics of offensive estoppel agree that the logic leading to the demise of mutuality applies equally in offensive and defensive applications.[55] They are concerned, however, with the relative unfairness[56] of

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Developments in the Law—Res Judicata, 65 HARV. L. REV. 818, 855 (1952).

[49] Note, *supra* note 41, at 1500.

[50] *See, e.g.,* Caufield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967); Friedenthal v. Williams, 271 F. Supp. 524 (E.D. La. 1967); Comment, *supra* note 18, at 1119-21.

[51] B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596 (1967); *see* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 350 (1971) ("[I]t is apparent that the uncritical acceptance of the principle of mutuality of estoppel . . . is today out of place."); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd as to estoppel sub nom.,* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

[52] *E.g.,* Moore & Currier, *supra* note 18, at 306; 64 COLUM. L. REV. 1141, 1143, 1146 (1964); 1964 DUKE L.J. 402, 403; 43 G.W.L. REV. 814, 825 (1975); 52 N.C.L. REV. 836, 845 (1974).

[53] *See, e.g.,* United States v. Webber, 396 F.2d 381 (3d Cir. 1968); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964), *noted in* 19 DEPAUL L. REV. 410, 416-17 (1969); *cf.* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 320-29 (1971).

[54] *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 349-50 (1971).

[55] *See* Moore & Currier, *supra* note 18, at 306.

offensive use and with certain practical ramifications of such use. But when there is an effective particularized inquiry into the prior action, fairness, as a due process concern, is never a general bar to the employment of estoppel. If offensive use seems to offer more opportunity for unfairness, perhaps it should be more carefully scrutinized,[57] but not generally barred on this account.

The practical ramifications offered in criticism of offensive estoppel lose potency when placed in an antitrust setting. One such criticism is that offensive estoppel would increase litigation,[58] particularly by discouraging consolidation of actions.[59]

> [B]y refusing to engage in litigation, [potential plaintiffs] may eagerly anticipate the benefits of a favorable judgment binding the defendant without risking preclusion from an adverse decision against the suing party.[60]

This argument, however, is not compelling in an antitrust context: The "suing party" whose litigation produces the estopping decree will normally be the government, and consolidation of private claims in government antitrust actions is discouraged.[61] In fact, the United States Supreme Court has determined that, in net terms, abandonment of mutuality would save judicial time,[62] the consolidation argument notwithstanding. The second practical criticism of offensive estoppel involves unforeseeability of collateral use of judgments. For a variety of reasons, a party might fail to litigate an issue or to litigate it fully, only to have it unexpectedly foreclosed in a later unforeseen action.[63] Again, the argument is less compelling in the antitrust context where defendants rarely fail to fully litigate issues arising in government actions. Indeed, the likelihood of collateral use in later private actions is an element of the

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[56] *See id.* at 307.

[57] *Cf.* Moore & Currier, *supra* note 18, at 308-11; 64 COLUM. L. REV. 1141; 1964 DUKE L.J. 402; 43 G.W.L. REV. 814; 52 N.C.L. REV. 836 (1974).

[58] Moore & Currier, *supra* note 18, at 309; 43 G.W.L. REV. 814, 821 (1975).

[59] *See* Moore & Currier, *supra* note 19, at 309; 64 COLUM. L. REV. 1141, 1147 (1964). *Contra*, 52 CORNELL L.Q. 724, 730 (1967).

[60] 64 COLUM. L. REV. 1141, 1147 (1964).

[61] *Cf.* Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1963) (no intervention of right by small music publishers in government antitrust action against unincorporated association of music writers and publishers).

[62] Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 348-49 (1971).

[63] *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (this possibility was raised but avoided by the court's decision); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 G.W.L. REV. 1010, 1036 (1967).

existing antitrust scheme.[64]

Use of offensive estoppel also would help effectuate current antitrust enforcement policy.[65] The treble damage action,[66] serving functions of deterrence, encouragement of capitulation, and compensation, is designed to encourage private participation in the antitrust scheme.[67] The effectiveness of this provision, however, has been curtailed by the expense and length of civil litigation—characteristics which are exacerbated by the complexity and tediousness of discovery and proof of antitrust issues.[68] Both expense and delay would be mitigated by use of offensive estoppel to the extent that a private suit involves issues identical[69] to those litigated in prior government actions. Conceivably, some treble damage suits could be reduced to an assessment of damages.[70] Furthermore, the federal trial dockets would benefit by a decline in relitigation of complex antitrust issues.[71]

Taken as a whole, the objections to offensive estoppel[72] require balancing the basic due process[73] fairness guaranteed putatively estopped parties and the policies of repose and judicial economy. As Professors Moore and Currier have noted,[74] such a proposition should not be addressed in policy terms alone. Is a particularized inquiry into the fairness of prior litigation as effective a safeguard as was the mutuality rule-of-thumb?

C. "Full and Fair": Due Process?

Professors Moore and Currier have argued that identification of the

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[64] *See* Clayton Act §§ 4, 5, 15 U.S.C. §§ 15, 16 (1970).

[65] The policies underlying collateral estoppel include stability and finality in the judicial process, freedom from harassing relitigation, and judicial economy. *See* notes 1 through 13 and accompanying text *supra*.

[66] Clayton Act § 4, 15 U.S.C. § 15 (1964).

[67] *See* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 380 (1965).

[68] Wheeler, *supra* note 5, at 1329-32.

[69] Estopped issues must be identical. *See, e.g.*, City of Detroit v. Grinnel Corp., 495 F.2d 448, 455-56 (2d Cir. 1974); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 853 (6th Cir.), *cert. denied*, 343 U.S. 942 (1952).

[70] *See* 1964 DUKE L.J. 402, 404-05; 35 G.W.L. REV. 1010, 1035-36 (1967).

[71] *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 328-29 (1971); Roberts v. Cooper, 61 U.S. (20 How.) 467, 481 (1858); Kithcart v. Metropolitan Life Ins. Co., 119 F.2d 498 (8th Cir. 1941), *cert. denied*, 315 U.S. 808 (1942); 1B J. MOORE, *supra* note 18, ¶0.441[2], at 3779; Currie, *supra* note 26, at 36; Comment, *supra* note 18, at 1099 & n.10.

[72] *See* 43 G.W.L. REV. 814, 822-25 (1975).

[73] *Cf.* Note, *supra* note 41, at 1497-98.

[74] Moore & Currier, *supra* note 18, at 307-11.

policy benefits derived from the use of offensive estoppel (limited to judicial economy, in their view)[75] cannot alone support an abandonment of mutuality. The question is whether, in light of the resulting cost of fairness, disposal of mutuality is the proper means to pursue these policy benefits. The strict in personam, dispute-settlement model of litigation assured fairness by requiring a party actually to be in court,[76] overseeing his own interests to the best of his capabilities, before binding him to a resulting judgment.[77] This strict model, however, has been eroded steadily through such litigation-streamlining devices as privity,[78] class actions,[79] virtual representation,[80] and issue consolidation.[81] This indicates that the strict in personam model, with its insistance on mutuality, was not the only means to the end of fairness.[82] Mutuality was a mere rule-of-thumb.[83] In this context, offensive estoppel has been viewed as comporting with due process: A particularized inquiry into the fairness of the prior litigation can simultaneously serve the due process principle and the policies of collateral estoppel.[84]

With regard to what comprises an adequate fairness inquiry, one

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[75] *Id.* at 308.

[76] Moore and Currier take the view that the "day in court" against each party opponent on each issue is an absolute due process standard. *Id.*

[77] A law suit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants. That which is settled as a fact between them through a given piece of litigation . . . binds only the parties themselves.

Hornstein v. Kramer Bros. Freight Lines Inc., 133 F.2d 143, 145 (3d Cir. 1943).

[78] *E.g.*, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892, 895 (1942); Note, *supra* note 41, at 1497.

[79] Comment, *supra* note 18, at 1104, *citing* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, *reh. denied*, 415 U.S. 952 (1974).

[80] Comment, *supra* note 18, at 1105.

[81] 28 U.S.C. § 1407(a) (1970).

[82] [The] exceptions to the general rule that one may not be bound . . . suggest that the rule may be something less than an unqualified command of due process. Such a conclusion is consistent, moreover, with the fact that due process, in general, does not impose uniform notice and hearing requirements on all . . . types of litigation. Rather it is a guarantee of reasonable procedures . . . . Thus, in determining in an individual case whether permitting collateral estoppel of a nonparty violates due process, one must examine with particularity the interests infringed and promoted by barring the relitigation of certain issues.

Note, *supra* note 41, at 1497-98; *see* Hansberry v. Lee, 311 U.S. 32, 42 (1940).

[83] *See* Currie, *supra* note 26; Note, *supra* note 41, at 1497-98; 52 CORNELL L.Q. 724, 729 (1967).

[84] 1964 DUKE L.J. 402, 406-07; *see, e.g.*, United States v. Webber, 396 F.2d 381 (3d Cir. 1968); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. D. Nev. 1962), *aff'd as to estoppel sub nom.*, United Air Lines, Inc., v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

commentator has compiled a list of pertinent factors:

> (1) whether the application [of estoppel] would lead to anomalous results; (2) whether the amount at stake in the prior action was for substantially less than the amount involved in the subsequent action; (3) whether the party asserting the estoppel was a party to the prior action; (4) whether the party against whom the estoppel is asserted had a full and fair opportunity to contest the decision now held to be controlling; (5) whether there is the necessary identity of issues that have been decided in the prior action; (6) whether the issues in the prior action were competently, fully, and fairly litigated; (7) whether the party against whom the prior judgment is being asserted presents any reasonable grounds for denying its application; and (8) whether the estoppel plea is being asserted offensively or defensively.[85]

Additional factors might include whether "there has been an actual inconsistency of verdicts in prior actions on this issue"[86] and whether the defendant "had sufficient reason to defend to the utmost"[87] in the prior action.[88]

Presumably the fairness evaluation would arise in the form of an affirmative defense to a motion for summary judgment on issues resolved in a prior government action. The party against whom estoppel is asserted, *i.e.* the party who had the previous opportunity to litigate the issue, would bear the burden of showing unfairness.[89]

Judicial development of standards such as those noted above is wholly consistent with the judicial function. A dispute-settlement model is compatible with such a particularized inquiry, and the fairness principle is no less administrable than other standards given content by the due process clause.[90]

II. Is Section 5(a) Preemptive?

A substantial impediment to the use of common law collateral estoppel in antitrust litigation involves the extent to which the preclusive effect of government-obtained decrees is preempted by section 5(a) of the Clayton Act.[91] Section 5(a) makes such decrees admissible in subse-

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[85] 52 N.C.L. Rev. 836, 846 (1974).

[86] 1964 Duke L.J. 402, 406.

[87] *Id.*

[88] Numerous other factors have been suggested. *See e.g.*, Currie, *supra* note 26, at 26; 64 Colum. L. Rev. 1141, 1145 (1964); 52 Cornell L.Q. 725, 728-29 (1967).

[89] *See* B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[90] *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970).

[91] Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964) (Supp. V 1976) provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or

quent private actions as prima facie evidence of issues actually litigated in the government action.[92] This provision logically could be subject to three alternative interpretations: (1) The words "prima facie" might be read broadly to encompass a more preclusive effect than their literal meaning implies;[93] (2) Congress, by setting the prima facie standard, has fully occupied the field,[94] and no other measure of preclusion is permissible; (3) the "prima facie" language was intended as a minimum standard[95] of preclusion and thus does not foreclose the use of more preclusive devices evolving independently of the Clayton Act.

The first approach, though facially appealing, has been undermined by a substantial body of case law in which "prima facie" has been read literally.[96] The second seems to defeat a strong legislative bias toward the maximum possible assistance to private antitrust litigants.[97] The third seems most consonant with the historical purposes of section 5, as recently delineated by the Supreme Court,[98] and most useful in employing currently available devices—common law collateral estoppel—in effectuating these policies.

A. Legislative History

The Clayton Act's legislative history provides no explicit support for any of the three approaches. It can be enlisted, however, although not conclusively, in support of the "minimum standard" approach.

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criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any such action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15(a) of this title, as to all matters respecting which the said judgment or decree would be an estoppel as between parties thereto. . . .

"It should be noted . . . that many cases have assumed that Section 5(a) fully occupies the area or have so ruled." McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975).

[92] *See* note 164 and accompanying text *infra*.

[93] *Cf.* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

[94] *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961) (discussed in text accompanying note 133 *infra*); McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975).

[95] "[T]he statutory history seems to suggest that Congress only intended to set a minimum standard for the effect of prior government antitrust judgments." McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975).

[96] *E.g.*, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

[97] McCook v. Standard Oil Co., 393 F. Supp. 256, 259-60 (C.D. Cal. 1975).

[98] Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

From the first, private participation has been perceived as a "most effective method" of antitrust enforcement.[99] By 1914, however, it was clear that the treble damage provision of the Sherman Act,[100] standing alone, had failed to encourage such participation to any substantial degree.[101] Primarily, the shortcomings were attributable to the prohibitive costs and complexities of undertaking such litigation.[102] In order to lower these barriers by allowing private litigants to benefit from government litigation,[103] and thereby encourage treble damage litigation,[104] section 5 of the Clayton Act was drafted to include two provisions: one giving government actions[105] a preclusive effect in subsequent private actions; and a second providing that the government action would toll the statute of limitations applicable to potential private actions.[106]

The House of Representatives' version of section 5 called for "conclusive"[107] (collateral estoppel) effect to be given issues adjudicated on

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[99] At the time of enactment of the Sherman Act . . . it was believed that the most effective method [of enforcement], in addition to the imposition of penalties by the United States, was to provide for private treble damage suits.

1955 U.S. CODE CONG. & ADMIN. NEWS 2328, 2329. *See also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965); Bruces Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947); Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972); City of Burbank v. General Electric Co., 329 F.2d 825, 835 (9th Cir. 1964); Breit & Elzinga, *supra* note 8, at 329 & n.1.

[100] Act of July 2, 1890, ch. 647, 26 Stat. 209, *codified in* 15 U.S.C. §§ 1-7 (Supp. V 1976). Section 7, the treble damage provision, was superseded by Clayton Act § 4, 15 U.S.C. § 13(b), and was repealed by the Act of July 7, 1955, ch. 283, 69 Stat. 283.

[101] 1955 U.S. CODE CONG. & ADMIN. NEWS 2328, 2329.

[102] *Id.; see* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965); City of Burbank v. General Electric Co., 329 F.2d 825, 831 (9th Cir. 1964); Orbo Theatre Corp. v. Loew's Inc., 156 F. Supp. 770, 776 (D.D.C.), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959).

[103] *See, e.g.*, Farmington Dowel Prod. Co. v. Foster Mfg. Co., 421 F.2d 61, 76 (1st Cir. 1970); City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th Cir. 1964).

[104] Wheeler, *supra* note 5, at 1325-26.

The effectiveness of section 5(a) in promoting treble-damage judgments seems clear: between 1961 and 1963 more than 85 percent of the reported treble-damage actions were preceded by a judgment for the Department of Justice.

Id. at 1326.

[105] The government action must be "final." *See, e.g.*, Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317-18 (1965); Farmington Dowel Prod. Co. v. Foster Mfg. Co., 421 F.2d 61, 66-67, 69-76 (1st Cir. 1970); City of Burbank v. General Elec. Co., 329 F.2d 825, 830 (9th Cir. 1964); Purex Corp. v. Proctor & Gamble Co., 308 F. Supp. 584, 589-90 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y. 1953); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1933).

[106] Clayton Act § 5, 15 U.S.C. § 16 (Supp. V 1976).

[107] 51 CONG. REC. 13851-57 (1914); *see* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 723 (9th Cir. 1959).

the merits in government actions.[108] The Senate debates, however, questioned the constitutionality of such an effect on due process[109] and seventh amendment grounds.[110] Accordingly, the term "prima facie"[111] was substituted for "conclusive,"[112] although the express expectation was that it would be similarly effective.[113] The legislative history thus reveals that the maximum preclusive effect *thought* to be within constitutional bounds was drafted into section 5.[114] The provision was explicitly intended to reduce the expense and complexity of private antitrust litigation[115] and thereby effectuate the deterrent[116] purpose of the treble damage provision.[117]

Although the original "prima facie" terminology has survived two subsequent amendments to section 5,[118] neither of the amendments concerned the preclusive effect of government actions.[119] Thus, as indicators of congressional satisfaction they are ambiguous.[120] The legislative history indicates that the drafters, in 1914, simply did not foresee the demise of mutuality of estoppel as a per se rule. Further, the history reflects an attempt to create the most preclusive effect available, but

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[108] As originally presented to the House, section 5 also made a "judgment or decree . . . by or on behalf of the United States" conclusive against any prospective treble-damage plaintiff. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 332 (1965) (Black, J., dissenting) (appendix).

[109] S. Rep. No. 698, 63d Cong., 2d Sess. 2 (1914).

[110] 51 Cong. Rec. 9492 (1914).

[111] The currently controlling construction of "prima facie" in this context is given in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69 (1951); *see* McCook v. Standard Oil Corp., 393 F. Supp. 256, 260 (C.D. Cal. 1975).

[112] 51 Cong. Rec. 13851 (1914).

[113] *Id.* at 16276.

[114] The desirability of preclusive effect remains in the law. Regarding the utility of section 5(a), the Supreme Court has said that "difficult questions of law may be tested and *definitively resolved* before the private litigant enters the fray." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1965) (emphasis added).

[115] "Thus, undoubtedly one purpose underlying the amendment adopted by Congress was to make it easier for private antitrust plaintiffs to recover from defendants already . . . found guilty . . . ." City of Burbank v. General Elec. Co., 329 F.2d 825, 831 (9th Cir. 1964); *see* 1955 U.S. Code Cong. & Admin. News 2328, 2329.

[116] The provision was intended both to deter illegal activity and to encourage quick capitulation once such activity is detected. *See* City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th Cir. 1964).

[117] *See* note 101 *supra.*

[118] Clayton Act § 5, ch. 283, § 2, 69 Stat. 282-83 (1955), *as amended,* 15 U.S.C. § 16 (Supp. V 1976).

[119] No material change was intended by the 1955 amendment to section 5 of the Clayton Act. City of Burbank v. General Elec. Co., 329 F.2d 825, 831 (9th Cir. 1964).

[120] *Cf.* 1955 U.S. Code Cong. & Admin. News 2328, 2328-33; 1974 U.S. Code Cong. & Admin. News 6535, 6541-42.

within a statutory scheme not explicitly providing for movement to a more preclusive standard should it become available.

B. The Legislative History as Read by the Courts

Judicial interpretation of the legislative history of section 5 has been far less than conclusive.[121] Indeed, the Supreme Court has considered the section's statutory history in depth on only two occasions: *Emich Motors Corp. v. General Motors Corp.*,[122] concerning the kinds of issues appropriate for section 5's effect, and *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*,[123] concerning whether a Federal Trade Commission action is a "final order"[124] in the sense necessary to toll a private action statute of limitations.

In *Emich Motors*, the Court noted that the underlying purpose of section 5 was "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions."[125] These "evidentiary benefits"[126] and their underlying purpose were all that the Court felt could be defined from an admittedly ambiguous statutory record: "The intended application and extent of such evidentiary benefits is not revealed by legislative materials."[127] Turning to the language of the Act, the Court determined that the preclusive effect was to extend to issues "necessarily decided by the conviction and the verdict."[128] Clearly, *Emich Motors* offers little[129] to the present inquiry, save an acknowledgement that section 5 is intended to lower barriers to private antitrust participation.

In *Minnesota Mining*, the Court strongly reinforced its acknowledgement of legislative purpose in *Emich Motors* by characterizing the "broad aim" of section 5 as enlistment of " 'private self interest as a means of enforcement' "[130] of the antitrust laws. The Court invoked the

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[121] *See* McCook v. Standard Oil Co., 393 F. Supp. 256, 258 (C.D. Cal. 1975) (collateral estoppel not applicable when defendant had no right to jury trial in first action and plaintiff was not a party to the prior action).

[122] 340 U.S. 558 (1951).

[123] 381 U.S. 311 (1965).

[124] See note 105 *supra*.

[125] 340 U.S. at 568.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 569.

[129] *See* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 725-26 (9th Cir. 1959), *quoting* Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 315 (E.D. Pa.), *aff'd*, 211 F.2d 405 (3d Cir. 1953).

[130] 381 U.S. at 318, *quoting* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

Reports of the 1914 House debates in stating that the " 'entire provision [was] intended to help persons of small means' "[131] in gaining redress against formidable adversaries.[132] The Court went on to find that Federal Trade Commission actions constitute "final action" so as to activate the statute of limitations tolling provision of section 5.

The Court again addressed the section 5 "prima facie" provision in *Sam Fox Publishing Co. v. United States,*[133] where it held that since private parties were in no way bound by antitrust consent decrees, they were not entitled to intervene "as of right" in a subsequent action to modify such a decree.[134] In so ruling, the Court surmised that

> [section] 5 of the Clayton Act, . . . making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a . . . private suit, *would seem* to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation . . . .[135]

Although this language could be misread to mean that Congress had preempted the question of preclusive effects of prior government action, the Court's reference to section 5 was gratuitous and without either supportive citations or reasoning. These indicia that the dictum was no more than an afterthought are reinforced by the Court's use of the vapid qualifier, "would seem."

Thus, the Supreme Court decisions offer little[136] more than acknowledgement of the statutory purpose to aid private antitrust litigants. However, one of the three suggested approaches to treatment of section 5(a) was eliminated by *Emich Motors'* foreclosure of a broad reading of "prima facie."[137] Although reading "prima facie" to mean "conclusive" was not in issue in *Emich,* the lower courts have unanimously taken this view of section 5 and have cited *Emich* for the proposition.[138] Elimination of the broader alternative, however, does not nec-

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[131] 381 U.S. at 319, *quoting* H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1913).

[132] 381 U.S. at 319.

[133] 366 U.S. 683, 690 (1961).

[134] *Id.* at 689-90; *see Note, supra* note 48, at 861-65.

[135] 366 U.S. at 690 (emphasis added).

[136] *Cf.* McCook v. Standard Oil Co., 393 F. Supp. 256, 259-60 (C.D. Cal. 1975).

[137] It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment *as evidence* in the present action.

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 571 (1951) (emphasis added).

[138] *See, e.g.,* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 726 (9th Cir. 1959); Eagle Lion Studios, Inc. v. Lowe's, Inc., 248 F.2d 438, 444 (2d Cir.), *aff'd,* 358 U.S. 100 (1957); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 315 (E.D. Pa.), *aff'd,* 211 F.2d 405 (3d Cir. 1953).

essarily require the conclusion that section 5(a) is entirely preemptive of other preclusive mechanisms.[139]

Except to confirm the literal reading of "prima facie," lower federal court opinions are inconclusive as to which of the remaining avenues should be traveled. While language in *Richfield Oil Corp. v. Karseal Corp.*[140] has been cited for the proposition that section 5 "fully occupies" the area,[141] the cited material falls short of a holding for preemption since it is largely an interpretation of section 5 and does not deal with the possibility of other preclusive mechanisms.[142] *Purex Corp. v. Proctor & Gamble Co.*,[143] insofar as it addresses section 5, is to the same effect, with a twist. Ruling that Federal Trade Commission orders are appropriate for section 5 prima facie effect,[144] the trial court stated that "[t]he Commission order cannot be both *prima facie* and conclusive; and, it having been determined that the statute [section 5(a)] applies, the statute must govern."[145] While this is preemptive language, it is important to note that the essential issue in *Purex* was whether 5(a) applied to Federal Trade Commission rulings. Having taken the step of finding the statute applicable, the trial court could hardly, in the face of *Emich*, put the statute immediately aside. In short, the plaintiff in *Purex* asked too much.[146] Additionally, the only case found which squarely recognizes the existence of the preemption issue is *McCook v. Standard Oil Co.*[147] Citing the conflicting authorities, the *McCook* court expressly refused to decide the preemption issue.[148]

C. *Policy Factors*

The original policy of section 5 was to encourage private participa-

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[139] *Cf.* McCook v. Standard Oil Co., 393 F. Supp. 256, 259-60 (C.D. Cal. 1975).

[140] 271 F.2d 709 (9th Cir. 1959).

[141] McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975).

[142] 271 F.2d at 723-28.

[143] 308 F. Supp. 584, 589-90 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

[144] 308 F. Supp. at 587.

[145] *Id.* at 589-90.

[146] The plaintiff . . . not only urges that section 5(a) *does* apply to the Commission order, but goes farther and contends, as a preferred alternative, that such order conclusively settles the issue of Proctor's violation of section 7, under the common law principle of collateral estoppel.

Id. at 586.

[147] 393 F. Supp. 256 (C.D. Cal. 1975).

[148] The *McCook* court refused to allow collateral estoppel because of countervailing seventh amendment considerations, *id.* at 258, and considered that this relieved it from deciding the preemption issue. *Id.* The court, however, characterized this result as an "exception" to what appeared to be the command of collateral estoppel. *Id.* at 206.

tion in antitrust enforcement by lowering the barriers of expense and complexity. As previously noted, the 1914 Congress drafted section 5 in the belief that it carried the maximum constitutionally permissible preclusive effect, with the express hope that it would be as effective as estoppel in furthering antitrust policies.[149] Six decades later, the perception of due process has changed. Due process is no longer viewed as requiring mutuality of estoppel in every case,[150] and preclusive effects need not be at the expense of seventh amendment values.[151] At the same time, complexity and expense once again are crippling the effectiveness of private antitrust participation,[152] and the federal trial dockets are inundated by relitigation of complex issues.[153] To attribute preemptive effect to section 5(a) under these circumstances would arrest the section's purposes within its own language. Surely Congress could not have intended to erect a barrier of the very sort section 5 was intended to surmount, while simultaneously eschewing newly developed mechanisms which would facilitate the section's purpose. Neither the case law nor the legislative history conclusively requires such preemptive effect. For these reasons, the most viable of the three approaches is to treat section 5 as a minimum standard established to protect policies without limiting the use of stronger preclusive devices.

D. The Minimum Standard Approach

Treatment of section 5 as a minimum standard of preclusion is consonant with the policies of the statutory scheme[154] and would permit the use of other preclusive mechanisms, particularly common law collateral estoppel, to effectuate those policies. Due process and the seventh amendment would continue to define appropriate situations in which to apply such mechanisms.

Because this alternative necessitates transgressing the statutory boundaries, a question arises as to whether our jurisprudence will permit the use of common law mechanisms to effectuate the express policies of

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[149] *See* note 113 and accompanying text *supra*.

[150] *Compare* note 109 and accompanying text *supra with* section *A supra*.

[151] *Compare* note 110 and accompanying text *supra with* section *C infra*.

[152] *See* text accompanying notes 9 & 10 *supra*.

[153] *See, e.g.*, Patmar Corp. v. Paramount Pictures Theaters Corp., 347 U.S. 89, 90-91 (1959); Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 776-77 (D.D.C. 1958), *aff'd*, 261 F.2d 380 (D.C. Cir.), *cert. denied*, 359 U.S. 943 (1959); Wheeler, *supra* note 5, at 1321.

[154] It is not coincidence that the policies underlying collateral estoppel are virtually identical with those toward which section 5 was aimed. As noted in section *B* 4 *infra*, common law collateral estoppel now would accomplish the objective of section 5(a) if allowed to operate in this field.

the statutory scheme. The answer appears to be "yes,"[155] and the most pertinent example[156] involves the Supreme Court's treatment of section 5(b) of the Clayton Act in the *Minnesota Mining*[157] case.

Section 5(b) is a limitations statute tolling provision. By providing that the filing of government complaints tolls the limitations provisions applicable to private antitrust actions, it allows private plaintiffs to await the outcome of government actions before filing treble damage actions. This provision is explicitly intended to streamline private actions by assuring that the preclusive effect of related government actions will be available to private plaintiffs.

A thorough investigation led the *Minnesota Mining* Court to conclude that the legislative history of section 5 was inconclusive as to whether the drafters intended FTC orders to have the statutorily created tolling effect[158]—just as the history is inconclusive on the question of preemption.[159] The Court concluded:

> In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions.
>
> . . . .
>
> It is true that the precise language of § 5(b) does not clearly encompass Commission proceedings. But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it. . . . [W]e think it clear that congressional policy sustaining § 5(b) would be effectively served only by tolling the statute of limitations in cases such as this, and we deem that policy controlling. . . . "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."[160]

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[155] Significantly, "[t]he objective of the Sherman Act was, in large part, to enact into a statute the principles of the common law . . . and to implement them by effective remedies." Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 777 (D.D.C. 1958), *aff'd*, 261 F.2d 380 (D.C. Cir.), *cert. denied*, 359 U.S. 943 (1959).

[156] For another example, the Ninth Circuit turned to the common law to give effect to this reading of Congressional purpose in section 5(a) (regarding "final action") in City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964).

[157] Minnesota Mining & Mfg. Corp. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

[158] *Id.* at 318-19.

[159] See section *B* 1 *supra*.

[160] Minnesota Mining & Mfg. Corp. v. New Jersey Wood Finishing Co., 381 U.S. 311, 320-21 (1965). For a statement that the policy arguments made by the Court regarding section 5(b) in *3M* apply even more strongly to section 5(a), see Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 68-69 (1970).

In a strong dissent, Mr. Justice Black maintained that non-judicial FTC orders lie outside the wording of the statute, and, to some extent, outside the statutory history.[161] This clarifies the majority's refusal to be bound by what were controlling exigencies in 1914. Thus, the message of *Minnesota Mining* seems to be that the policies underlying section 5 are not to be sacrificed to obstructive phenomena which disappeared during the intervening half-century.

In the case of section 5(a), however, it is not necessary, as the Court did in *Minnesota Mining*, to juggle statutory meanings to fulfill legislative policy. As noted, to reread 5(a) as 5(b) was reread in *Minnesota Mining* would unnecessarily disturb substantial precedent. By accepting the viable alternative of viewing 5(a) as a minimum standard of preclusiveness, the courts can satisfy legislative policy by resorting to common law collateral estoppel when appropriate. In this manner, the policies of streamlining private participation through reduction of expense and complexity would be served; early capitulation of defendants would be encouraged;[162] and federal trial dockets would be cleared of previously litigated complex issues.[163]

The scope of estoppel would extend only to issues adjudicated on the merits and necessary to the decision in government actions.[164] Such a limitation would not unduly or unfairly burden defendants because those issues essential to the government's case frequently will lack the requisite identity to carry over to private actions.[165] For example, a nation-wide relevant market, conclusively established as an element of a violation prosecuted in a government action, will not carry over to a

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[161] 381 U.S. at 324-34 (Black, J., dissenting).

[162] *See, e.g.*, City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th Cir. 1964); Homewood Theatre, Inc. v. Loew's, Inc., 110 F. Supp. 3298, 410 (D. Minn. 1952), *appeal denied*, 207 F.2d 263 (8th Cir. 1953).

[163] See note 153 *supra*.

[164] *See, e.g.*, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951) (prima facie effect "extends only to questions 'distinctly put in issue and directly determined' "); Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 77-80 (1970).

[165] This is a result of the operation of the "necessarily decided" standard of *Emich Motors*, discussed at length in Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 77-80 (1970). *See, e.g.*, City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974); Eagle Lion Studios, Inc. v. Loew's, Inc., 141 F. Supp. 658, 666 (S.D.N.Y. 1956), *aff'd*, 248 F.2d 438 (2d Cir. 1957), *aff'd*, 358 U.S. 100 (1958); T.C. Theatres Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 270 (S.D.N.Y. 1953).

private action in which a local relevant market must be proved.[166] The appropriateness of the specifics of government decrees for preclusive effects in private actions would thus remain in issue, as it now is in the prima facie context.[167] Further, since it is now commonly litigated in that context, the expertise of neither court nor counsel will be taxed by inquiry into identicalness of issues.

III. The Right to Jury Trial as a Bar to Estoppel

The second major objection to giving conclusive effect to decrees in government actions is that to estop relitigation of issues in a private legal action might deprive some defendants of the right to a jury trial.

A. Justice Department Actions at Law

The Federal Rules of Civil Procedure preserve the seventh amendment[168] right to a jury trial in federal civil actions.[169] Failure to demand a jury, however, constitutes a waiver of that right.[170] Thus, in the absence of waiver, the right to a jury trial in a subsequent damages action would not be infringed by according estoppel effect to issues already tried[171] in Justice Department civil suits, including actions under sections 1 and 2 of the Sherman Act, the Clayton Act, and the Robinson-Patman amendments to the Clayton Act.[172] Indeed, the bulk of Justice Department actions are civil actions.[173]

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[166] *See, e.g.*, Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 542-44 (1954); City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 853-54 (8th Cir. 1952).

[167] The purpose of this enactment was to enable the plaintiff in a private antitrust suit to rely on a prior judgment . . . in a civil suit brought by the Government, as proof . . . . In that event, the plaintiff is merely required to show that the conspiracy affected him and that he was injured by it.

Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 776 (D.D.C. 1958), *aff'd*, 261 F.2d 389 (D.C. Cir.), *cert. denied*, 359 U.S. 943 (1959).

[168] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII.

[169] Fed. R. Civ. P. 38(a), (b).

[170] *Id.* 38(d).

[171] There must be a "final order." See note 124 *supra*.

[172] *See* M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, Cases and Materials on Trade Regulation 155 & n.18 (1975).

[173] For example, 72 of the 87 Justice Department actions filed in 1972 were civil actions. *Id.* at 156.

Defendants have a right to trial by jury in criminal actions as well,[174] so that, again, estoppel of issues litigated in Justice Department criminal actions would not deprive defendants of the right to jury trials in later civil suits.

B. Justice Department Injunctions

Justice Department actions seeking to enjoin allegedly illegal activity usually are not tried to juries, although they may be.[175] When "all parties" do agree to Rule 39 permissive juries, the equity court will treat the jury findings as if the jury were "of right,"[176] and jury trial requirements would appear to be thus satisfied. It is questionable, however, how frequently defendants in such actions will agree to permissive juries knowing that their agreement could remove a bar to preclusive use of issues settled in prior proceedings. Arguably, if a jury was available to a defendant on an issue and he eschewed it, he has waived the right to a jury trial on that issue.[177] This argument, however, has been expressly rejected by at least one court,[178] and probably would be mooted in most cases by government unwillingness to agree to Rule 39 juries[179] because of the attendant delay.

Must equitable actions be excluded from the posited estoppel effect of prior-litigated issues? This result would be unfortunate, conditioning as it would the preclusive effect of government litigation on the relative fortuity of which agency launched the action and how the action was couched. Professor Shapiro and his co-author, Daniel Coquillette, have made a forceful argument which, if accepted, would prevent this result. Concerning the seventh amendment, they argue that

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[174] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

[175] In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

FED. R. CIV. P. 39(c).

[176] *See id.* The probable effect of a court-ordered advisory jury on issues is unclear. *Cf.* McCook v. Standard Oil Co., 393 F. Supp. 256, 258-59 n.2 (C.D. Cal. 1975).

[177] *See* Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions*—Rachal v. Hill, 71 COLUM. L. REV. 1329, 1341 (1971); *cf.* Crane Co. v. American Standard, Inc., 490 F.2d 332, 342 (2d Cir. 1973).

[178] McCook v. Standard Oil Co., 393 F. Supp. 256, 258 n.2 (C.D. Calif. 1975); *see* Comment, *supra* note 177, at 1341 n.6.

[179] The strongest case for preservation of seventh amendment rights through Rule 39 juries can be made for "of right" juries, requiring both parties' agreement. See notes 175 through 176 *supra*.

> whatever its worth when an issue has not yet been litigated, its use to retry a complex question already fully and fairly aired in an adversary proceeding seems . . . to involve a net loss of substantial proportions. Nothing in the seventh amendment, in the Supreme Court's interpretation of it, or in considerations of fairness and justice requires such a loss to be borne.[180]

In short, the seventh amendment does not require a second jury trial of issues fully and fairly tried in an earlier action. The Shapiro-Coquillette argument has two major components. First, the usual test for determining when juries are mandated by the seventh amendment is an "historical test,"[181] *i.e.* a comparison[182] with the practice regarding juries that obtained in English courts in 1791, the year the amendment was adopted.[183] By the end of the eighteenth century "it appears to have been generally agreed in the [Anglo-American courts] that determinations made in equity were binding in courts of law."[184] Thus, the historical test would not foreclose estoppel in later actions at law of issues settled in prior equitable, adversarial actions.

The second part of the Shapiro-Coquillette argument is that Supreme Court treatment of the amendment does not foreclose such estoppel. Their conclusion, however, is at odds with the position taken by the Fifth Circuit in *Rachal v. Hill.*[185] In that case, the Fifth Circuit reversed a grant[186] of estoppel effect on issues decided in a non-jury Securities and Exchange Commission injunction action on the ground that to do so would abridge the defendant's right to a jury trial on the estopped issues.[187] The *Rachal* opinion relies heavily on *Beacon Theatres, Inc. v. Westover,*[188] a case in which the Supreme Court ruled that when legal and equitable issues were present in the same case, it was error to try

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[180] Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 458 (1971).

[181] *See* 5 J. MOORE, *supra* note 18, ¶ 38.11[7], at 128.4; James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 655-56 (1963); Note, Ross v. Bernhard; *The Uncertain Future of the Seventh Amendment,* 81 YALE L.J. 112, 113 (1972).

[182] Note, *supra* note 181, at 113.

[183] If at common law in 1791 a party were entitled to a trial by jury, then this right is preserved and is generally accorded to a party in a similar suit today. At common law a jury trial was generally available in an action triable at law, while suits in equity were determined by the court sitting without a jury. 40 U. CIN. L. REV. 373, 375 (1971) (footnotes omitted).

[184] Shapiro & Coquillette, *supra* note 180, at 45; *see, e.g.*, 1974 DUKE L.J. 970, 983; 40 U. CIN. L. REV. 373, 380 (1971).

[185] 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971).

[186] SEC v. Mooney Aircraft, Inc., C.A. No. SA69CA-4 (W.D. Tex., Mar. 27, 1969) (unpublished).

[187] 435 F.2d at 64.

[188] 359 U.S. 500 (1959).

the equitable issues separately first, thus taking them away from the jury.[189] This led the Fifth Circuit in *Rachal* to the conclusion that a determination of equitable issues could under no circumstances displace jury consideration in subsequent legal actions.[190] Shapiro and Coquillette, on the other hand, would read *Beacon* to require only that the jury trial should be preserved by being held first when ordering of issue consideration in a unified action is possible; and, that when such ordering is impossible, no such requirement would attach.[191] Further, they find even this limited reading not to be strictly principled but to hinge upon a preference for not trying legal issues in equity.[192] Thus, Shapiro and Coquillette conclude, *Rachal* draws too strong a connection between giving unlitigated questions to juries where possible on the one hand, and requiring relitigation to a jury of questions which demonstrably have been fully and fairly litigated in an adversarial, albeit equitable, action on the other.[193]

Rachal has generated little comment in the cases[194] and has found support only in the Third Circuit case of *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*[195] In that case, the holding being based squarely on the seventh amendment, arbitration findings were held not to preclude the defendant's rearguing of damages issues to a jury.[196] This result, however, seems justifiable since arbitration proceedings fall short of the full adversarial nature of an equity proceeding in a federal court. Viewed in this light, *Lynne Carol* is compatible with the particularized inquiry advocated herein.

Rachal has been strongly attacked in the Second Circuit. In *Crane Co. v. American Standard, Inc.*,[197] Judge Friendly noted that *Beacon*, the linchpin of *Rachal*, assumes that estoppel in a damages suit may arise from a prior equity suit.[198] Judge Friendly concluded that "a judgment in a suit which had been properly brought and tried . . . in equity

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[189] *Id.* at 510-11.

[190] 435 F.2d at 64. The *Rachal* court accepted the demise of mutuality of estoppel. *Id.* at 61-62.

[191] Shapiro & Coquillette, *supra* note 180, at 446-47.

[192] *Id.* at 447.

[193] *Id.*

> The defendant in *Rachal* . . . was presumably raising the jury issue, not for the purpose of assuring a hearing before a jury, but simply in order to get a second trial of the same issue.

Comment, *supra* note 177, at 1340; *see id.* at 1332, 1335.

[194] 1974 DUKE L.J. 970, 977 n.37.

[195] 453 F.2d 1177 (3d Cir. 1972).

[196] *Id.* at 1184.

[197] 490 F.2d 332 (2d Cir. 1973).

[198] *Id.* at 342.

must govern all future proceedings between parties to which collateral estoppel would normally apply."[199] Noting that the historical test does not require a jury to rehear issues fully litigated in equity, Judge Friendly stated: "We are not at all sure that *Rachal* was correctly decided."[200] In a subsequent case, *Goldman, Sachs & Co. v. Edelstein*,[201] the Second Circuit underlined its repudiation of *Rachal*. That case involved various actions[202] against a common defendant, involving common issues. An action in the series under which a jury trial had been waived, *Franklin Savings Bank v. Levy*,[203] was unexpectedly scheduled to take place prior to another in which a jury had been requested,[204] *Welch Foods, Inc. v. Goldman, Sachs & Co.*[205] Had the cases been tried in this order, the *Franklin* adjudication could foreclose issues presented in common with the *Welch* jury trial. Under *Rachal*, this result would be avoided by simply refusing to apply *Franklin* to preclude the retrial of issues in *Welch*. The *Goldman* court, however, concluded that *Crane* could require such estoppel, thus preventing a second trial of the common issues. In order to follow *Beacon*'s mandate to preserve jury trials where possible,[206] mandamus was issued to the *Franklin* court to empanel a jury.[207] The Second Circuit, thus, seems clearly to have rejected *Rachal* in favor of the Shapiro-Colquillette view that issues fully and adversarially litigated in equity may be estopped in later actions at law.

Beneath the surface of *Beacon* and *Crane* there appears to lie some seldom-articulated principle of the seventh amendment. The amendment has been difficult of principled applications[208] largely because its underlying principles have been obscured by long use of rules-of-thumb to determine applicability. The first such rule-of-thumb is to read "actions at common law," for which the amendment preserves jury trial,

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[199] *Id.* at 343. As recognized by the *Rachal* court itself, "normal" application of collateral estoppel, in the federal law, would not normally require mutuality. Rachal v. Hill, 435 F.2d 59, 61-62 (5th Cir. 1970).

[200] 490 F.2d at 343 n.15.

[201] 494 F.2d 76 (2d Cir. 1974).

[202] *Id.* at 77 (15 actions involved).

[203] 64 F.R.D. 731 (D.C.N.Y. 1974). See 1974 DUKE L. J. 970, 971 n.8.

[204] *See* 494 F.2d at 77.

[205] Civ. No. 70-4811 (S.D.N.Y. 1976).

[206] This is particularly true where actions are consolidated. *See* Comment, *supra* note 177, at 1332.

Policies favoring joinder of all plaintiffs in one action also may argue for the *Rachal* result, *see id.*, but such consolidation is discouraged in federal, equitable antitrust actions. See note 61 and accompanying text *supra*.

[207] 494 F.2d at 78.

[208] *See* 88 HARV. L. REV. 1035, 1041 (1975).

to mean actions at law generally, as opposed to actions in equity.[209] However, the line between law and equity has never been clear and the merger of law and equity in federal practice[210] has further obscured it.[211] A second rule-of-thumb, the historical test, has been used to help draw the line.[212] This test is criticized as overly rigid[213] and lacking in precision, since many modern actions have no satisfactory counterpart in eighteenth century English jurisprudence.[214] Most importantly, however, it begs the question of what informing principle is meant to guide the amendment's application.

The Supreme Court, apparently attempting to clarify empirical guidelines to seventh amendment application while smoothing its applicability to modern forms of action, pronounced the following test in *Ross v. Bernhard*:[215]

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[216]

Taken as a whole, this tripartite test detracts from the historical test[217] and focuses upon the "fundamental principle underlying the evolution of the bifurcated English judicial system."[218] This principle is "that equity would take jurisdiction where a litigant could not adequately assert his right at law."[219] The *Ross* test provides a framework for revealing conditions of inadequacy at law.[220] In light of *Ross,* then, the seventh

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[209] *See, e.g.*, 40 U. CIN. L. REV. 373, 374 nn. 9 & 10 (1971); Note, *supra* note 184, at 113.

[210] FED. R. CIV. P. 2.

[211] *See* Note, *supra* note 184, at 114.

[212] For an example of the historical test in determining the right to trial by jury, see Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511-19 (1959).

[213] *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 175-76 (1970); 88 HARV. L. REV. 1035, 1042 (1975).

[214] *See* 88 HARV. L. REV. 1035, 1041-42 (1975); 40 U. CIN. L. REV. 373, 380 (1971).

[215] 396 U.S. 531 (1970).

[216] *Id.* at 538 n.10.

[217] Arguably, the *Bernhard* test substantially modifies the historical approach, *see* Note, *supra* note 184, at 126-28, by reading "common law" out of the seventh amendment through requiring jury trial of legal issues even in equitable actions, *id.* at 122. *But see The Supreme Court, 1969 Term, supra* note 213, at 176.

[218] Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401, 411 (1973).

[219] *Id.*; *see* Note, *supra* note 184, at 133.

[220] Note, *supra* note 218, at 411.

amendment can be read to say that when none of these conditions obtain, the cause should be tried at law,[221] and when causes are tried at law, a jury should hear them. This, however, cannot be made to mean that equitable actions are somehow per se inadequate so that their results must be litigated a second time. We must look elsewhere to find a principle governing the adequacy of equitable decrees in later actions at law. The answer is found in the law of collateral estoppel: Traditionally, properly adjudicated issues in equity have been held estopped at law.[222]

Modern procedure is narrowing the circumstances in which the law cannot provide adequate remedies.[223] This is reflected in the Supreme Court's growing favor of jury trials.[224] Indeed, a decreasing role for equity means more jury trials (or circumstances in which they must be available), thus illustrating the principle underlying the seventh amendment at work. Congress, however, has decided that the relief it seeks through certain Justice Department antitrust actions is not available at law; an equitable action is statutorily prescribed.[225] This action involves fully adjudicated adversarial actions in which issues are settled as to certain parties. The current law of collateral estoppel forecloses relitigation of those issues as to those parties. When a subsequent separate damage action arises between those parties, an adequate remedy at law is available, and the seventh amendment will preserve the right to a jury trial in that action. However, the fact that some issues are foreclosed by prior adjudication, albeit equitable, is not implicated. The essence of the right is not a second jury trial on a particular issue but recourse to law when it provides a remedy and a right to a jury in the action at law. Issue foreclosure from past separate actions is implicated by the seventh amendment only if it somehow compromises the validity of the second action—as by foreclosing what are in effect the ultimate issues in the later action (not the case when damages are the issue)—or would appear to involve some unfairness.[226]

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[221] Note, *Right To Jury Trial Under Section 5(1) of the Federal Trade Commission Act—Building "Iron Power" in the Seventh Amendment*, 59 MINN. L. REV. 715, 740 (1975).

[222] *See* Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204 (1953).

[223] *See* Note, *supra* note 184, at 119; 40 U. CINN. L. REV. 373, 376 (1971).

[224] *See, e.g.*, Dairy Queen, Inc. v. Wood, 396 U.S. 469 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

[225] Sherman Act § 4, 15 U.S.C. § 4 (1970); Clayton Act §§ 16, 20, *codified in* 15 U.S.C. § 26 (1970) and 29 U.S.C. § 52 (1970).

Congress may constitutionally make such findings conclusive on courts as a basis for money judgments, so long as infected with no error of law. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[226] *See* Comment, *supra* note 177, at 1338-39.

United States v. J.B. Williams Co.[227] illustrates that in cases where unfairness may appear,[228] the solution is not to require wasteful relitigation, but to require actions to be tried to juries at the earliest possible step. In *Williams,* this solution required inserting juries into previously jury-less damages adjudications.[229] In the Justice Department antitrust context, this would mean requiring juries in the injunction action. Another illustration of this point is found in *Goldman* where the Second Circuit, faced with what was in effect a scheduling error, ordered a jury for the first trial rather than requiring wasteful relitigation. In short, to preserve the right to jury trial from an apparent unfairness in the operation of collateral estoppel, the jury was inserted at the earliest practicable step.

The conclusion to which *Beacon,* traditional practice, and the Second Circuit cases lead is that the right to a jury trial does not require relitigation of issues already fully litigated in adversarial equity actions. It appears that the seventh amendment principle underlying those cases is not even implicated in such an estoppel. Thus, *Rachal* appears wrongly decided.[230]

The strict rule of *Rachal* also seems to lack congruence with the Court's explicit reservation of the possibility that, under some circumstances, equitable actions might properly foreclose the jury trial right.[231] This view is consistent with that of the Restatement of Judgments: "Where a question of fact is . . . submitted to the jury *or other trier of facts* . . . the judgment is conclusive . . . in a subsequent action . . . ."[232] Additionally, the Shapiro-Coquillette analysis of seventh amendment principles seemingly indicates that lack of a jury trial on certain issues would not categorically foreclose giving estoppel effect to those issues later.[233] The acceptability of this result is reinforced by the Supreme Court's acceptance of estoppel in later legal actions of issues settled in certain kinds of non-jury administrative hearings.[234] Indeed, the case for estoppel would appear stronger in the civil antitrust context than in a purely administrative context.[235]

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[227] 354 F. Supp. 521 (S.D.N.Y. 1973), *rev'd in part,* 498 F.2d 414 (2d Cir. 1974).

[228] In this case, the Federal Trade Commission, having settled issues in a less than full adversarial setting, urged estoppel on those issues in a subsequent civil penalty action to which the FTC was, in effect, a party. 354 F. Supp. at 526.

[229] 498 F.2d at 430.

[230] *See* Crane Co. v. American Standard Co., 490 F.2d 332, 343 n.15 (2d Cir. 1973).

[231] *E.g.,* Katchen v. Landy, 382 U.S. 323, 334-35, 339-40 (1966).

[232] RESTATEMENT OF JUDGMENTS 368, Comment C, at 296 (1942) (emphasis added).

[233] *See, e.g.,* 59 MINN. L. REV. 715, 722 (1975).

[234] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 420-23 (1966); *see* Comment, *supra* note 177, at 1333-34.

[235] *See, e.g.,* Note, *supra* note 221, at 740; Comment, *supra* note 177, at 1335.

The foregoing discussion illustrates that principled objections based upon the seventh amendment do not form an absolute bar to giving estoppel effect to issues adjudicated in equity proceedings. This being the case, strong policies come into play favoring giving estoppel effect,[236] at least after particularized review of the circumstances of the preceeding actions.[237] One such policy, judicial economy, is advanced by non-relitigation of complex issues.[238] Another is the strong legislative policy, acknowledged by the Supreme Court,[239] of employing prior government decrees in order to lower barriers to effective private participation in antitrust enforcement.[240] Finally, the countervailing policy of fairness to defendants in foreclosing certain issues can be given appropriate particularized evaluation in each instance.[241]

IV. Estoppel Arising from Federal Trade Commission Actions

Federal Trade Commission (FTC) actions are treated separately because, being administrative, they do not automatically seem to fit conclusions reached concerning court actions. They do not utilize juries,[242] and since they are not, strictly speaking, judicial in nature, they may seem less amenable to the quality of preclusiveness assigned to court actions. Neither of these apparent shortcomings, however, has prevented the Supreme Court from endorsing estoppel of issues at law based on prior administrative findings made under proper conditions.[243]

A. Preclusiveness at Law of Administrative Actions

In *United States v. Utah Construction & Mining Co.*,[244] the Supreme Court approved extension of estoppel effect from administrative findings to a subsequent, related action for damages.[245] Although a statutory scheme was implicated in the result,[246] the Court was explicit that the "general principles of collateral estoppel"[247] would have produced the same result:

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[236] *See* Shapiro & Coquillette, *supra* note 180, at 457-58.

[237] *See* Comment, *supra* note 177, at 1338-39.

[238] *See* Note, *supra* note 184, at 122-26.

[239] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

[240] *See* notes 102 through 104 and accompanying text *supra*.

[241] This is analogous to the "full and fair" due process inquiry discussed in section *A supra*.

[242] *See* notes 175 & 176 and accompanying text *supra*.

[243] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 420-23 (1966).

[244] *Id.*

[245] *Id.* at 418-19.

[246] *Id.* at 418.

[247] *Id.* at 421.

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata.[248]

Acceptance of estoppel in legal actions by prior administrative findings has been approved in the Fourth,[249] Fifth,[250] Sixth,[251] Ninth,[252] and District of Columbia[253] Circuits. These cases do not stand for a "*per se* concept of finality being accorded administrative rulings in every instance,"[254] so that seemingly contrary authority exists side by side with cases accepting the doctrine.[255] Determination of the appropriateness of estoppel following agency decision is particularized. Criteria governing the inquiry include whether the agency has acted in a judicial capacity,[256] whether the putatively estopped issues were "properly before" the agency,[257] whether the parties had an adequate opportunity to litigate the issue,[258] and "whether there is some factor present . . . which militates against the application" of estoppel.[259] Other suggested factors include identity of issues and their being addressed on the merits,[260] both of which are usual incidents of collateral estoppel.[261]

One suggested standard which has not been followed is that the administrative finding be final.[262] Administrative finality is sometimes

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[248] *Id.*

[249] Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955).

[250] Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969).

[251] International Wire Co. v. Local 38, IBEW, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

[252] Paramount Transp. Sys. v. Teamsters Local 150, 436 F.2d 1064 (9th Cir. 1971).

[253] Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 809-10 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

[254] International Wire, Inc. v. Local 38, IBEW, 357 F. Supp. 1018, 1024 (N.D. Ohio, 1972), *aff'd*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

[255] *See, e.g.*, Strip Clean Floor Finishing v. District Council No. 9, 333 F. Supp. 385 (E.D.N.Y. 1971); Old Dutch Farms, Inc. v. Teamsters Local 584, 281 F. Supp. 971 (E.D.N.Y. 1968); Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967).

[256] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966).

[257] *Id.; see* Dawson, *Why a Decision by the NLRB Under 8(b)(4) Should be Determinative on the Issue of Liability in a Subsequent Section 303 Damage Suit*, 27 OKLA. L. REV. 660, 672 (1974).

[258] *See* note 257 *supra.*

[259] International Wire, Inc. v. Local 38, IBEW, 357 F. Supp. 1018, 1024 (N.D. Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

[260] *See* Dawson, *supra* note 257, at 672.

[261] See note 17 *supra.*

[262] *See* Note, *Labor Law—Res Judicata—The Applicability of Res Judicata and Collateral Estoppel to Actions Brought Under Section 8(b)(4) of the National Labor Relations Act*, 67 MICH. L. REV. 824, 830 (1969).

conditioned on review in the court of appeals;[263] thus losers before agencies could thwart estoppel by refusing to seek review. In short, any alleged unfairness in the agency proceeding could be raised in the later damage suit in opposition to a suggestion of estoppel.[264] With fairness thus setting the boundary, "[i]t is now accepted that . . . collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity."[265]

Antitrust actions prosecuted by the FTC pose one problem beyond the foregoing material: Can FTC actions be included in the general administrative analysis, or are they gathered into the potentially preemptive arms of section 5(a) of the Clayton Act?[266] If section 5(a) does not apply, they avoid the preemption problems discussed in section *B* of this article. Significantly, although it is not finally settled that FTC actions lie within the purview of section 5(a), the Supreme Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*[267] brought them within 5(b), and at least two circuits[268] have squarely decided that they lie within 5(a) as well.[269]

In *Minnesota Mining*, the Supreme Court was faced with the question of whether an FTC action tolled the limitations statutes for filing follow-up private antitrust actions.[270] The Court stated that although "the precise language of § 5(b) does not clearly encompass Commission proceedings," it was "clear that Congressional policy . . . would be effectively served only by tolling the statute of limitations in cases such as this, and we deem that policy controlling."[271]

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[263] *Id.; see* Dawson, *supra* note 257, at 672-73.

[264] *See, e.g.*, International Wire, Inc. v. Local 38, IBEW, 357 F. Supp. 1018, 1024-25 (N.D. Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

[265] International Wire, Inc. v. Local 38, IBEW, 357 F. Supp. at 1023.

[266] *See generally* section *B supra*.

[267] 381 U.S. 311 (1965).

[268] Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970); Purex Corp. v. Proctor & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

[269] Because the assistance to the private litigant may even be greater under section 5(a), we would think that only a strong countervailing policy should limit the application of section 5(a) [from applying to FTC orders].

. . . .

[T]he legislative concern that the defendant get a "day in court" before section 5(a) operates against him is fully satisfied by a Federal Trade Commission proceeding.

Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 68-69, 76 (1st Cir. 1970) (footnote omitted).

[270] 381 U.S. 311, 313-320 (1965).

[271] *Id.* at 321.

In *Purex Corp., Ltd. v. Proctor & Gamble Co.*,[272] the district court borrowed the legislative intent analysis of *Minnesota Mining* in finding that "final"[273] FTC orders were admissible as prima facie evidence under section 5(a).[274] In so doing, the court explicitly announced that since FTC orders were brought under section 5(a) and its prima facie provision, the expanding doctrine of common law collateral estoppel could not be applied to render FTC findings conclusive.[275] As has already been noted, "prima facie" has been literally interpreted far too often to be reasonably expanded in meaning or effect.[276]

The *Purex* conclusion, if followed, would have ironic results probably not intended by the district court and certainly not by the moving party in the case. It seems clear that in arguing for inclusion of FTC orders under section 5(a), the moving party intended to increase the preclusive effect of such orders available to subsequent private plaintiffs. In light of the development of a general doctrine of administrative preclusion in which conclusive effect can be given to proper administrative findings, section 5(a) in fact represents a retreat from the maximum available preclusive effect.

Perhaps other circuits and ultimately the Supreme Court will not follow the First and Ninth Circuits in bringing FTC findings within the confines of section 5(a). If they do, the suggested treatment of section 5(a) as a minimum standard of preclusion could be applied to FTC actions as well.

B. FTC Preclusiveness and the Seventh Amendment

While allowing agency findings to estop relitigation of issues in later legal actions, the authorities discussed above made no mention of the lack of juries. This suggests that "the courts simply did not believe that this fact raised any significant problems,"[277] even though there clearly was a right to jury trial in the subsequent actions.[278]

Rachal v. Hill[279] is an example of a decision in which the court did view the lack of a jury as raising a problem. As noted, *Rachal* has been strongly criticized, largely for its misuse of precedent.[280] *Rachal*'s me-

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[272] 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert denied*, 405 U.S. 1065 (1972).

[273] 308 F. Supp. at 586.

[274] *Id.* at 586-90.

[275] *Id.* at 589-90.

[276] *See* notes 137 & 138 and accompanying text *supra*.

[277] Comment, *supra* note 177, at 1333.

[278] *See id.* at 1333 n.32.

[279] 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

[280] The existing case law thus indicates that *Beacon Theatres* does not

chanical requirement of retrial to a jury seems particularly inappropriate in light of the doctrine of particularized analysis of the need for such retrial. Further, the seventh amendment does not require retrial to a jury of issues settled in a prior equity action.[281] The same would apply to prior administrative action should the standards discussed earlier in this section be met. As stated by the First Circuit, "a final Commission order is qualitatively comparable to a court judgment."[282]

V. Conclusion

The most concise statement of the principle underlying the thesis of this article was provided by Shapiro and Coquillette in their work dealing with the implications of *Rachal.*

> [T]o retry a complex question already and fully and fairly aired in an adversary proceeding seems . . . to involve a net loss of substantial proportions. Nothing in the seventh amendment, in the Supreme Court's interpretation of it, or in considerations of fairness and justice requires such a loss to be borne.[283]

The author submits that appropriate use of estoppel in antitrust litigation can operate to reduce this loss by serving to rid the federal dockets of many superfluous complexities. Furthermore, the private litigant's ability to deter conduct violative of the antitrust laws would be greatly strengthened. Both upshots are not only desirable, but, as the foregoing analysis has shown, are amply supported both in logic and precedent. Indeed, to view the federal law as preemptive is congruent only with the law of estoppel circa 1914 and is thus the paradigm of irony: A statute ambiguously drafted more than 60 years ago to provide the most preclusive effect legally permissible at that time is read to have codified the then extant more limited view of estoppel which has been largely discredited during the passing of those years. Even if this result was beneficial, it would remain illogical. Moreover, since it exacerbates overcrowded federal dockets with complex, previously litigated issues while simultaneously weakening the position of the private litigant in the antitrust scheme, this result is not only illogical, it is unreasonable.

> necessarily compel the result reached in *Rachal.* Moreover, it may even conceivably be argued that *Beacon Theatres* . . . is, in truth, wholly inapplicable to the situation . . . .

Comment, *supra* note 177, at 1335; *see* note 180 *supra.*

[281] *See* Shapiro & Coquillette, *supra* note 180, at 451, 458; Pennington v. Gibson, 57 U.S. (16 How.) 65 (1853).

[282] Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 76 n.38 (1st Cir. 1970).

[283] Shapiro & Coquillette, *supra* note 180, at 458.

INTERDISTRICT REMEDIES FOR SCHOOL SEGREGATION AFTER *MILLIKEN v. BRADLEY* AND *HILLS v. GAUTREAUX*

*Stephen Barrett Kanner**

In *Milliken v. Bradley*,[1] the Supreme Court described conditions in which interdistrict remedies[2] may be granted for equal protection violations. Interdistrict relief is appropriate where local or state officials have manipulated boundary lines to maintain segregation,[3] where two or more districts have committed violations,[4] or where a violation within one district, committed by that district or by the state, has produced a significant segregative effect in another district.[5] The latter situation, which might be characterized as the "segregative effect approach," is an important model for analyzing equal protection violations and for framing interdistrict remedies. The Court's refusal to grant interdistrict relief in *Milliken* caused many commentators to view the case with dismay.[6] These critics, however, ignored *Milliken*'s possibilities.

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[1] 418 U.S. 717 (1974).

[2] A district or jurisdiction may be a school district, county, incorporated city, or other subdivision of the state. The form of interdistrict remedy will vary according to the type of violation and the nature of its effects. Typical remedies include interdistrict busing, consolidation of districts for a specific governmental function, an order to construct public housing, or an order to grant a variation in zoning or building requirements in a neighboring district. These remedies are equitable in nature and necessarily involve the issuance of an injunctive decree. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

[3] Milliken v. Bradley, 418 U.S. 717, 744 (1974); *see, e.g.*, Wright v. Council of Emporia, 407 U.S. 451, 470 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 489 (1972).

[4] This "unclean hands" approach is implied by *Milliken*. "With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case . . . ." Milliken v. Bradley, 418 U.S. 717, 745 (1974). Thus, presumably if two districts were shown to have committed violations, both might be included in an interdistrict remedy.

[5] Milliken v. Bradley, 418 U.S. 717, 744-45 (1974). The Court's language is at times problematic. Before districts may be consolidated or a cross-district remedy imposed, "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Id.* The Court then suggests that a remedy would be in order where discriminatory acts of the state or of a single district produce "interdistrict segregation." *Id.* at 745.

[6] "Court Puts A Stone Wall Before the School Bus," New York Times, July 28, 1974, at E 3, col. 3. "The Supreme Court . . . seemed to say that the lower federal courts may not reach out to the suburbs in search for remedies." The New Republic, Jan. 24, 1976,

Indeed, four post-*Milliken* lower court decisions suggest that the situations in which interdistrict relief may be granted are by no means as restrictive as the critics orginally thought.[8] Moreover, the impact of *Milliken*'s "segregative intent" formulation is, as yet, not fully developed.

Significant developments are also taking place in the context of public housing. *Hills v. Gautreaux*,[9] a recent case involving discriminatory placement of public housing by the Chicago Housing Authority, is exemplary. The Supreme Court, although finding none of the conditions set forth by *Milliken*, permitted a remedy which extended beyond Chicago's corporate boundaries because such a remedy would not interfere with or coerce the suburban governments.[10] In effect, the Court held that such a remedy is not interdistrict and therefore *Milliken* need not apply. Although *Gautreaux* opens the possibility of broad remedies involving federally-funded public housing, its coercion theory will have little direct impact upon remedies granted against schools. Housing remedies may, however, change the racial proportions in a school district and, thereby, achieving gradual school integration in the suburbs, without the necessity for busing.[11]

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at 12. Echoing these conclusions, scholarly criticism has viewed *Milliken* as the first setback in the expansion of equal protection. *See* Dell'Ario, *Remedies for School Segregation: A Limit On the Equity Power of the Federal Courts?*, 2 HAST. CON. L.Q. 113 (1975); Freilich, *Down with the Doughnut—Up with the Whole: The Need for Metropolitan Relief in School and Housing Integration*, 7 THE URBAN LAWYER xi, xiv (1975); Wolf, *Social Science Data and the Courts: The Detroit Schools Case*, 42 THE PUBLIC INTEREST 102 (1976); Comment, *Milliken v. Bradley in Historical Perspective: The Supreme Court Comes Full Circle*, 69 Nw. U.L. REV. 799, 800-01 (1974); Note, *Race Relations and Supreme Court Decision-Making: Jurisprudential Reflections*, 51 NOTRE DAME LAW. 91, 91 (1975). *See also* Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel*, 82 YALE L.J. 1681, 1682 (1973). *But see* "The Detroit Ruling," The Washington Post, July 29, 1974, at 26, col. 1.

[8] United States v. Missouri, 515 F.2d 1365, 1370 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975); Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 939 (7th Cir. 1974), *aff'd sub nom.*, Hills v. Gautreaux, 96 S. Ct. 1538 (1976); Evans v. Buchanan, 393 F. Supp. 428, 445-46 (D. Del. 1975), *aff'd mem.*, 423 U.S. 963 (1976).

[9] 96 S. Ct. 1538 (1976).

[10] *Id.* at 1546.

[11] It is not argued that courts should always grant the broad interdistrict remedies which are discussed. Calculation of the benefits of an additional amount of integration and the costs which broad and complex remedies involve will vary from case to case, and may change as our knowledge of the effects and value of integration increases. This article seeks to point out the options available to the courts to grant or refuse to grant interdistrict relief; it does not seek to debate the value of integration or the harm of segregation. For a discussion of the latter issues see C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN,

I. *Milliken v. Bradley:* Conditions for Interdistrict Relief

Before *Milliken,* the question of interdistrict relief had arisen only in the context of cases in which school district lines had been drawn or altered to perpetuate segregation. In cases such as *Wright v. Council of Emporia*[12] and *United States v. Scotland Neck Board of Education,*[13] the Court established that boundary lines which had been drawn or changed to maintain segregation need not be respected, and an appropriate order consolidating districts or redrawing boundaries could be entered.[14]

The more difficult question was whether boundary lines might be bridged where the boundaries themselves had not been established for discriminatory purposes. Early school desegration cases, primarily involving separate schools for blacks and whites within the same county, city, or school district, failed to address this question.[15] A remedy which eliminated the violation usually achieved integration as well. The courts subsequently were faced with many northern jurisdictions which were predominantly black. Therefore, if a court sought to achieve integration, it had to reach an area larger than one district. Generally, the district lines were of long standing and were not drawn to foster segregation, and thus were seemingly immune from attack under the doctrine of *Wright* and *Scotland Neck.* Thus, the conditions under which a federal court could include more than one subdivision in an equal protection remedy were unsettled before *Milliken.*[16] While it had been argued that the fourteenth amendment acted upon the states and that subdivisions were essentially irrelevant in framing relief,[17] a counter-argument suggested that a violation had to be proved within each subdivision before

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H. Gintis, B. Heyns, S. Michelson, Inequality: A Reassessment of the Effect of Family and Schooling in America (1972); United States Commission on Civil Rights, Racial Isolation in the Public Schools (1967); M. Weinberg, Desegregation Research: An Appraisal (2d ed. 1970); Fiss, *The Jurisprudence of Busing,* 39 Law & Contemp. Prob. 194 (1975).

[12] 407 U.S. 451 (1972).

[13] 407 U.S. 484 (1972). Discriminatory use of boundaries also formed the basis for remedies in Haney v. County Bd. of Educ., 429 F.2d 364, 366 (8th Cir. 1969), and United States v. Texas, 321 F. Supp. 1043, 1050-51 (E.D. Tex. 1970), *aff'd and modified,* 447 F.2d 441 (5th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972).

[14] Wright v. Council of Emporia, 407 U.S. 451, 461-62 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 489 (1972).

[15] *E.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Green v. County School Bd., 391 U.S. 430 (1968).

[16] Although the issue was first presented in Bradley v. School Bd., 412 U.S. 92 (1973), *aff'g per curiam* 462 F.2d 1058 (4th Cir. 1972), the Court left it unresolved.

[17] *E.g.,* Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel, supra* note 6, at 1681.

that subdivision could be joined in a remedy.[18] "Unclean hands" is an appropriate term for this approach.

Because they felt it impossible to achieve a desired level of integration within the city of Detroit, the lower courts in *Milliken* sought to fashion a metropolitan, interdistrict remedy.[19] The unclean hands approach would prevent this remedy since the surburbs of Detroit were not shown to have committed violations. The lower courts, however, adopted an agency theory of liability[20] under which the subdivision is viewed as an agency of the state and the state is held liable for the agency's violations. Since the state controls all of its subdivisions, interdistrict relief is appropriate to cure a violation within one particular district.[21]

The Supreme Court, however, rejected this attempt to disregard district boundaries, reiterating that the goal of an equal protection remedy is to eliminate state-imposed segregation and its effects, not to achieve integration per se.[22] Critics misread this rejection as an adoption of the unclean hands approach as the *exclusive* route to interdistrict relief.[23] They confused the theories upon which an interdistrict remedy may be granted and the goal it is supposed to achieve. The Court's objection did not concern the disregarding of boundaries, but rather the granting of a remedy simply to achieve integration.[24] Boundaries

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[18] This argument may appeal to a visceral sense of fairness. In personifying the jurisdiction, however, it ignores the individuals in the "innocent" jurisdiction, who may have been injured through a segregative effect from a "guilty" jurisdiction. One court of appeals judge in *Milliken* expressed the view that "the adjoining three counties and the 52 school districts [should not] be penalized because they [were] located near Detroit." Milliken v. Bradley, 484 F.2d 215, 260 (6th Cir. 1973) (Weick, J., dissenting); *cf.* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1974).

[19] 418 U.S. 717, 739-40 (1974).

[20] 484 F.2d 215, 249 (6th Cir. 1973).

[21] Counties and subdivisions are created by the state as convenient agencies for exercising governmental power, and a state may grant or withhold powers and privileges from them as it sees fit. Trenton v. New Jersey, 262 U.S. 182, 186 (1923); Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907). Since subdivisions are agencies of the state, officials of these subdivisions are state agents and their official action constitutes state action. *See* Cooper v. Aaron, 358 U.S. 1, 16 (1958); Note, *Consolidation for School Desegregation: The Unresolved Issue of the Inevitable Sequel, supra* note 6, at 1682.

[22] Milliken v. Bradley, 418 U.S. 717, 747 n.22 (1974).

[23] Freilich, *supra* note 6, at xiv; Wolf, *supra* note 6, at 109. *But see* Note, *Interdistrict Desegregation: The Remaining Options,* 28 STAN. L. REV. 521 (1975), which recognizes the segregative effect approach, but fails to perceive the equally significant unclean hands approach of *Milliken.*

[24] The Court accepts the instrumentality approach only arguendo. Milliken v. Bradley, 418 U.S. 717, 746 (1974). Recognizing that a remedy for a violation in one district may go as far as the effects of that violation without regard for boundaries, the instrumentality

may be disregarded,[25] but only with the narrower goal of eliminating the segregative effects of the original violation.[26]

Although the *Milliken* Court held that a violation in both districts is sufficient to allow an interdistrict remedy, its adoption of the segregative effect approach means that "unclean hands" is not a necessary condition but merely one of several grounds sufficient for granting interdistrict relief.[27] In order to appreciate the scope of this new approach, one must understand the Court's theory of segregative effect.

A. The Concept of Segregative Effect

The Court in *Milliken* espoused principles to govern remedies in both interdistrict and intradistrict cases. The goal of a remedy is "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[28] The remedy is intended to eliminate the effects of a violation, not to achieve integration per se. "The controlling principle . . . is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[29]

The Court further specified conditions under which interdistrict relief might be granted. Those conditions—segregative effect, unclean hands, and boundary manipulation—appear to be imperfect translations of *Milliken*'s controlling principle.[30] Under the segregative effect approach, a remedy is permissible where a violation in one district has

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approach becomes irrelevant to the Court's analysis. In situations where it is relevant, however, the Court has not hesitated to adopt this approach. *See* Reynolds v. Sims, 377 U.S. 533, 575 (1964).

[25] 418 U.S. at 744.

[26] Several dissenting Justices lend support to this view of the segregative effect approach. Justice White read the majority opinion to preclude reaching outlying districts

> unless unconstitutional actions of the Detroit School Board have had a segregative impact on other districts, or unless the segregated condition of the Detroit schools has itself been influenced by segregative practices in these surrounding districts into which it is proposed to extend the remedy.

Id. at 763 (White, J., dissenting). *See also id.* at 789 (Marshall, J., dissenting).

[27] *Gautreaux* reinforces this conclusion. Hills v. Gautreaux, 96 S. Ct. 1538, 1544 (1976).

> The desegregation order [overturned in] *Milliken* required consolidation of local school districts . . . without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct.

[28] 418 U.S. at 746.

[29] *Id.* at 744; *see* Louisiana v. United States, 380 U.S. 145, 154 (1965) (The remedial duty is "so far as possible [to] eliminate the discriminatory effects.").

[30] 418 U.S. at 744-45.

"caused a significant segregative effect" in another district.[31] There may well be, however, segregative effects which can be viewed as neither "significant" nor as "caused" by the violation in another district. Since the Court nowhere defines these terms, their meanings must be derived from an illustration of a segregative effect given by the Court and by direct analogy.

1. The Carver School District Case

The Supreme Court's example involved the Carver School District, an all-black system with no high school.[32] Carver students had to be bused to more distant schools in Detroit because neighboring all-white suburbs allegedly refused to accept them. The Court acknowledged that if these allegations were correct, the violation by the white suburbs may have had a segregative effect upon two districts—Carver and Detroit.[33] The Carver students then attending segregated schools would have attended integrated schools had the white suburbs not refused to accept them. The Detroit schools which received the Carver students also felt the segregative effect because they were more segregated. An interdistrict remedy—busing the Carver students to the white suburbs instead of to Detroit—would eliminate these effects.[34]

2. Analogies to Carver

A court applying *Milliken* must determine the types of population shifts which qualify as segregative effects. One direct analogy is a suburb's refusal to admit blacks, either through state involvement in discriminatory practices in the private housing market or through a racially-motivated exclusion in public housing.[35] Here the violation pro-

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[31] *Id.* at 745.

[32] *Id.* at 725 n.4, 749-50.

[33] The Court stated that this situation "may have had a segregative effect on the school populations of the two districts involved," *id.* at 750, without specifying to which districts, Detroit, Carver, or the white suburbs, they were referring. The Court speaks, however, of the refusal of "suburban districts," suggesting that the "two districts" must be Carver and Detroit. *Id.*

[34] *See* Note, *supra* note 23, at 524.

[35] The discretionary authority to grant building permits, water and sewage facilities, and zoning variances may not be used to prevent the construction of low income public housing. City of Black Jack v. United States, 508 F.2d 1179, 1184 (6th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farm Workers v. City of Delray Beach, 433 F.2d 799 (5th Cir. 1974); Crow v. Brown, 332 F. Supp. 382, 390-92 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 694 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th

duces a segregative effect upon the city, *viz.* the black population increases as it is confined to the city, while whites are free to enter the suburbs.[36]

A similar analogy is found in the recent case of *United States v. Board of School Commissioners (Indianapolis)*.[36.1] There a housing authority had jurisdiction to build throughout a county which encompassed a city and its suburbs. It located public housing, however, exclusively in the city, which contained 95 percent of the county's black population. The court found that the effect was to "produce discriminatory effects both within [the city] and the suburbs" and to increase the racial disparity between city and suburb.[36.2] Two types of segregative effects may thus be hypothesized. First, the black population was confined to the city and denied housing opportunities it would have had if the housing authority had built throughout the metropolitan area in a non-discriminatory manner. Secondly, as the confined black population grew larger, the city would be more perceptibly black and thus cause or accelerate white flight to the suburbs.

By varying the facts in *Garrett v. Hamtramck*,[37] another analogy is suggested. City *A* deliberately razes most of its black neighborhoods, forcing blacks to move to adjoining district *B*. *B*'s population shifted from 60 percent to 90 percent black, while *A* went from 80 percent to 95 percent white. The segregative effects in *B* were directly caused by *A*'s action. Therefore, since the violation in one district caused a significant "segregative effect" in another district, interdistrict relief would be appropriate.

B. Causation and White Flight

The most prominent population shift which increases segregation is white flight.[38] The shift may significantly increase segregated condi-

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Cir. 1970). *But see* Citizens Committee v. Lindsay, 362 F. Supp. 651, 657-59 (S.D.N.Y. 1973), *aff'd*, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

[36] There is evidence that this bottleneck effect may cause white flight. Coleman found that both the absolute proportion of blacks in the city and a high racial differential between city and suburbs had strong effects upon the rate of white flight. J. COLEMAN, S. KELLY & J. MOORE, TRENDS IN SCHOOL SEGREGATION, 1968-73, at 63-66 (1975) [hereinafter cited as COLEMAN].

[36.1] Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007 (7th Cir., July 16, 1976).

[36.2] *Id.* at 22.

[37] 357 F. Supp. 925 (E.D. Mich. 1973), *remanded*, 503 F.2d 1236 (6th Cir. 1974).

[38] *Compare* Norwood v. Harrison, 413 U.S. 455, 457 (1973), *with* United States v. Mississippi, 499 F.2d 425, 429-30 (1974), *and* Brunson v. Board of Trustees, 429 F.2d 820, 822 (1970). The definition of white flight depends upon the context in which it is used. Thus, for white flight in response to the building of a public housing project, actual

tions in the predominantly white suburbs and leave the city more black.[39] The question of whether white flight is caused by an equal protection violation, so as to fit the segregative effect model, can arise in two ways. First, plaintiffs may argue that an earlier court-ordered remedy was ineffective,[40] or that further violations demand a new remedy.[41] Secondly, plaintiffs may be before the court for the first time, having proved a violation in a single district, but asking for interdistrict relief. In these situations, an interdistrict remedy which consolidates city and suburban schools or orders cross-district busing may remove much of the incentive for white flight.[42] As the court in *Evans v.*

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movement of population is the relevant concept. In response to an order integrating schools, white flight has two components: actual relocation of population, and withdrawal of white students from the public school system. This latter element, particularly the private "segregation academy" option, may be more important in the South than in the North. This fact correlates with other findings that many southern districts are metropolitan in scope, eliminating the option of relocation. *See* note 41 *infra*.

Courts have rarely stopped to define white flight. Their usage again reflects the context of the case. Southern courts have given more recognition to the private school element in white flight, whereas northern cases refer mainly to suburban relocation. United States v. Board of School Comm'rs, 502 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974).

When courts examine figures, they scrutinize the loss of white population from the school system. *E.g.*, Board of Educ. v. Mapp, 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 3199 (1976). The loss of white school population, however, does not differentiate between the two components of white flight, nor does it deal with other factors which may alter school population.

[39] COLEMAN, *supra* note 36, at 41.

[40] This would be analogous to the plaintiffs' situation in Green v. County School Bd., 391 U.S. 430, 434-35 (1968).

[41] Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

[42] Coleman has observed that there is a "large increase in the effect of desegregation on white loss if there are suburban alternatives." COLEMAN, *supra* note 36, at 64, 66. In general, he found a sharp rise in interdistrict segregation (whiter suburbs, blacker cities) in response to integration within the city. In contrast, after metropolitan integration was ordered in Tampa-Hillsborough, a metropolitan-wide school system, integration increased dramatically. *Id.* Table 10 at 38, Table 13 at 50. In Tampa, the white school population increased 11 percent during the 1969-73 period, while other cities experienced white loss ranging from 8 to 59 percent and averaging 26 percent. *Id.* Table 16 at 70.

Another study of Florida integration orders reached the same conclusion.

> These findings appear to support multiple district desegregation plans . . . . Several urban school districts have suffered severe losses in white enrollments coincident with desegregation. The large urban districts in the present study—Dade, Duval and Palm Beach—have also lost white students but not in sufficient numbers to significantly alter the racial balance in the public schools. The most apparent reason for this difference in outcome is the geographic scope of the districts. [They] are large county-wide districts surrounded by districts also undergoing desegregation. Residential mobility is thus eliminated as a

Buchanan[43] observed:

> The increasing number of black students [in the city] generated white parental fears. But to produce action a second factor was necessary: the existence near-at-hand of systems in which black students were barely present. The Wilmington suburbs provided just such an 'escape'.[44]

In the Carver situation, the violation by the suburbs, *i.e.* their refusal to admit blacks, directly caused a segregative effect. In contrast, white flight is often not directly caused by the violation itself but by a remedy for the violation.[45] More precisely, it results from individual response to that remedy. For example, a court order to end de jure school segregation within one jurisdiction may instigate white flight or suddenly increase the rate thereof. Before an interdistrict remedy may be granted, it is necessary to determine whether, under these circumstances, white flight may be viewed as a product of the original violation.[46] One might argue that the Supreme Court chose to speak only of direct causation to foreclose consideration of any more distant causation. The Court's language, however, does not suggest any intent to depart from traditional notions of causation.[47]

In the vocabulary of tort law, the one-district remedy which causes

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means of avoiding desegregation and consequently as a force toward resegregation.

Giles, Cataldo & Gatlin, *Desegregation and the Private School Alternative* in SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT 28-29 (G. Orfield ed. 1975).

[43] 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

[44] 393 F. Supp. at 436 n.15.

[45] Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILO. & PUBL. AFF. 3, 29-30 (1968).

[46] As much as any population movement, white flight is the result of multiple causes. It is important to distinguish between the easy case where no white flight occurred before the integration remedy and the more difficult one where flight has been going on for years at X percent per annum. In the latter case, the party seeking an interdistrict remedy would seek to prove that the remedy was the cause of the sudden jump to 2X percent per annum. In his statistical work, Coleman is careful to separate the pre-integration shift in white population and the shift attributable to integration. COLEMAN, *supra* note 36, at 59-61.

The situation in which an integration order increases the rate of ongoing white flight is one of joint causation. Plaintiffs presumably would have to show that the integration order was the major cause of this increase. Defendants could then rebut by positing other factors which could be the dominant cause of the increase in white flight. In reply, however, plaintiffs also may show state involvement in these other factors. For example, white flight may be caused not only by school integration but also by the deterioration of inner-city neighborhoods. Plaintiffs may prove that such deterioration is fostered by state or federally regulated banks in "redlining" racially integrated neighborhoods and similar practices. Thus, the other cause of white flight would itself be an equal protection violation.

[47] Milliken v. Bradley, 418 U.S. 717, 744-45 (1974).

or aggravates white flight is an intervening cause.[48] The question is whether the liability of the state which caused the original violation extends to the harm done by the intervening cause. Analogy to many tort cases suggests an affirmative answer. For example, where a person causes physical harm to another, he may be held liable for further injury caused by a physician, even where the physician is negligent.[49] Indeed, liability may be found even where the later injury cannot realistically be called foreseeable.[50]

Moreover, the white flight sequence meets the requirements of "but for" causation;[51] that is, but for the initial violation, the segregative effect would not have occurred.[52] Had the initial violations not occurred, the one-district remedy would not have been granted—just as the aid of the physician would have been unnecessary but for the action of the tortfeasor.

The extent to which a court is willing to trace causation does not depend upon an inquiry into the abstract meaning of causation. Indeed, whether a remedy should be afforded is a policy decision. Courts have traced causation through many intervening events to find a causal relationship which served public policy or constitutional goals.[53]

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[48] "An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 271 (1971).

[49] *Physician negligent:* Jessee Edwards, Inc. v. Goergan, 256 F.2d 542 (10th Cir. 1958); Thompson v. Fox, 326 Pa. 209, 192 A. 107 (1937). *Physician not negligent:* Simmons v. Lollar, 304 F.2d 774 (10th Cir. 1962); Adams v. Dantin, 107 So. 2d 809 (La. App. 1958); Lane v. Southern Ry., 192 N.C. 297, 134 S.E. 855 (1926).

[50] W. PROSSER, *supra* note 48, § 44, at 275-76.

[51] *See id.* § 41, at 238-39.

[52] Causation is a difficult concept, provocative of much debate among social scientists and philosophers. But litigants need only satisfy courts which have developed notions of legal causation based upon doctrines such as intervening cause. The argument advanced here is not the broad one that but for the violation the racial composition of city *A* and suburb *B* would be markedly different today. Had schools been integrated forty years ago, it is possible that white flight would have occurred more rapidly in the '40's and '50's. Proof of this counterfactual argument depends upon many factors—migration, residential preferences, original racial distribution in a metropolitan area, conditions for "tipping"—about which no certain inferences can be drawn. Mr. Justice White suggests, but does not develop, this broad "but for" argument in his dissent. Milliken v. Bradley, 418 U.S. 717, 779 (1974) (White, J., dissenting).

The proposed argument is far narrower. It relates the occurrence of an integration order and a one-time large exodus of whites, or, if white flight has been a continuing phenomenon, a rise in the rate of that flight and suggests that this short-term, observable shift is caused by the integration order. This is the same phenomenon which Coleman measured. He concluded that within 1 year after desegregation, "there is a sizeable loss of white" population. COLEMAN, *supra* note 36, at 78.

[53] Seidel v. Greenberg, 108 N.J. Super. 248, 260 A.2d 863 (1969). Consider Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973): "[A] connection between past segregative

The goal of any equal protection remedy is the elimination of both state-imposed segregation and its effects.[54] Accordingly, the Supreme Court insists that the remedy be effective in achieving that goal. Moreover, in shaping a remedy, the Court has considered the response of individuals to earlier remedial efforts. In *Green v. County School Board,*[55] a lower court order to desegregate was effectuated by instituting a "freedom-of-choice" plan that allowed parents to enroll their children in any school within the county.[56] The Supreme Court rejected the plan as ineffective since individual choice had led to continued segregation.[57] To be effective, the remedy had to ensure integration by direct student assignment.

In other words, the state remained liable for the segregation perpetuated by the response of individuals to a court-ordered remedy and was ordered to eliminate that segregation through a more effective remedy. Similarly, if the consequence of white flight in response to court-ordered integration is "partially [to] nullify the effects of school integration,"[58] courts may hold the state responsible for this segregative effect and require its eradication through a more effective interdistrict remedy.

In *Pasadena City Board of Education v. Spangler,*[59] the Court rejected a district court remedial order which required annual readjustment in all schools so that no single school would be comprised of a preponderance of "minority" students.[60] The district court orginally had ordered that attendance lines be drawn to meet this "no majority of minority students" standard.[61] Once that standard was met, the issue became whether the district court had the power to order annual reorganizations necessitated by changing student populations which had led to some predominantly black student bodies.[62]

The Court emphasized that the remedial decree must be based upon a finding that segregation was "in some manner caused" by a violation, for "absent a constitutional violation there would be no basis

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acts and present segregation may be present even where not apparent and . . . close examination is required before concluding that it does not exist."

[54] *See* notes 28 & 29 *supra.*

[55] 391 U.S. 430 (1968). *See also* Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968) (Once integration is achieved, a free transfer plan is impermissible as it allows "*resegregation* of the races.")

[56] 391 U.S. at 433-34.

[57] *Id.* at 441-42.

[58] COLEMAN, *supra* note 36, at 28.

[59] 96 S. Ct. 2697 (1976).

[60] *Id.* at 2704.

[61] *Id.* at 2701.

[62] *Id.* at 2701-03.

for judicially ordering assignment of students on a racial basis."[63] The Court found that the segregative effect, *i.e.* the deviations from the "no majority of minority students" which had occurred since the decree had been issued, could be attributed neither to the school board nor to the remedy itself:

> The fact that black student enrollment at five out of thirty-two of the regular Pasadena schools came to exceed 50% during the . . . period . . . apparently resulted from people randomly moving into, out of, and around the . . . area.[64]

As in *Milliken,* the Supreme Court concluded that the lower court order was designed to achieve integration rather than to eliminate the effects of past violation.

Thus, in rejecting a remedy aimed at achieving racial balance by correcting population shifts which were not caused by the school board or the earlier remedy, the Court suggests, at least inferentially, that a remedy may be granted to eliminate only the effects of population shifts which result from either the original violation or from an earlier remedy. Such a conclusion is harmonious with both *Milliken* and *Spangler* because, rather than seeking racial balance as a goal, it seeks only to eliminate the effects which have flowed from the state's original violation.

II. *Hills v. Gautreaux:* Noncoercive Remedies Not Limited By Boundaries

Since the Supreme Court's decision in *Milliken,* the lower federal courts have not been uniform in their interpretation of *Milliken* when considering interdistrict remedies.[65] The Court's recent pronouncements in *Hills v. Gautreaux*,[66] however, have resolved some of the differences.[67] Of greater interest is the fact that each of the lower court cases satisfies several of *Milliken*'s conditions, suggesting that situations permitting interdistrict relief may be fairly common. In *Newburg Area Council, Inc.*

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[63] *Id.* at 2704, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

[64] 96 S. Ct. at 2704; *see* note 46 *supra.*

[65] *Compare* United States v. Missouri, 515 F.2d 1365, 1370-71 (8th Cir. 1975), *with* Newberg Area Council, Inc. v. Board of Educ., 510 F.2d 1358, 1360-61 (6th Cir.), *cert. denied,* 421 U.S. 131 (1975), *and* United States v. Board of School Comm'rs, 503 F.2d 68, 70 (7th Cir. 1974).

[66] 96 S. Ct. 1538 (1976).

[67] For example, *Gautreaux* makes it clear that either the unclean hands approach or the segregative effect approach alone is a sufficient condition for granting interdistrict relief. 96 S. Ct. at 1544; *see* note 23 *supra.*

v. Board of Education,[68] the Seventh Circuit found that two school districts had committed violations, thereby meeting *Milliken*'s unclean hands requirements.[69] In addition, it found that boundary lines had been drawn intentionally to maintain segregation.[70] Finally, there was evidence of the busing of blacks from a white to a black district.[71] In *United States v. Missouri*,[72] the court found several examples of the delineation or refusal to change boundaries to maintain segregation.[73] *Evans v. Buchanan*[74] also contained a multitude of evidence to support interdistrict relief. The court found violations by the state, the federal government, and the local housing authority had precipitated white flight and interdistrict segregation.[75] In addition, state violations caused segregative effects in both city and suburbs through transportation of students to private schools and through a state statute which excluded Wilmington from the scope of a school consolidation scheme.[76]

In a recent decision, *United States v. Board of School Commissioners*,[76.1] the Seventh Circuit affirmed an interdistrict remedy under *Milliken* on several grounds. In 1969, the Indiana legislature adopted a consolidation statute which united Indianapolis and the surrounding suburbs in Marion County into a consolidated metropolitan government known as "Uni-Gov." Although all other governmental services were consolidated, a separate statute specifically exempted the city school system from consolidation with suburban systems. Because 95 percent of Marion County's blacks lived in the city, the court concluded that the legislation was a "substantial cause of interdistrict segregation."[76.2] The court agreed with the district court that "[w]hen the General Assembly expressly eliminated the schools from consolidation under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [within Indianapolis]."[76.3] It concluded that "but for" the legislation exempting the school district from consolidation, the entire county would now constitute one school district under either earlier school reorganization acts or the Uni-Gov statutes.

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[68] 510 F.2d 1358 (6th Cir.), *cert. denied*, 421 U.S. 131 (1975).
[69] 510 F.2d at 1359.
[70] *Id.* at 1360.
[71] *Id.* at 1360-61.
[72] 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).
[73] 515 F.2d at 1370.
[74] 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).
[75] 393 F. Supp. at 434-38.
[76] *Id.* at 436-39, 445.
[76.1] 541 F.2d 1211 (7th Cir. 1976).
[76.2] *Id.* at 1220.
[76.3] *Id.* at 1221.

In addition to causing segregative effects, the statute was held to constitute the boundary manipulation condemned in *Wright v. Council of Emporia*. Finally, the court found that housing violations had caused segregative effects in both the city and suburbs, thus providing another basis for an interdistrict remedy.[76.4]

Hills v. Gautreaux[77] is the latest of a long series of cases involving public housing in Chicago. The Chicago Housing Authority had located virtually all of its public housing projects, which were overwhelmingly black-occupied, in the black areas of Chicago.[78] Although the district court found the Housing Authority's discriminatory placement of public housing violative of the federal constitution,[79] it refused to grant plaintiffs' request for a remedy which extended into the suburbs.[80] On appeal, the Seventh Circuit held that the "equitable factors which prevented metropolitan relief in Milliken v. Bradley [were] simply not present . . . ."[81] The court then held that any effective plan to remedy the racially discriminatory public housing system within Chicago would have to be on a suburban or metropolitan area basis.[82] Although it specifically found that none of *Milliken's* conditions had been satisfied,[83] the Supreme Court unanimously held that metropolitan relief might be permissible if the remedy did not interfere with or coerce suburban governments.[84] In effect, the Court held that a remedy is not interdistrict when it does not "consolidate or in any way restructure local governmental units" or "displace the rights and powers [of] local governmental entities,"[85] despite the fact that the remedy may extend beyond the geographic boundaries of a subdivision.

Although the holding in *Gautreaux* is problematic, its implication for school remedies is clear. A school remedy may extend beyond one district without complying with *Milliken* if that remedy is noncoercive. An examination of the characteristics of the remedy contemplated in *Gautreaux* suggests a substantial improbability that such a remedy could be constructed for schools. The *Gautreaux* remedy was acceptable because it did not require uninvolved local governments to: (1) consolidate with others; (2) be restructured; (3) participate through request-

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[76.4] See text accompanying notes 97.1 through 97.3 *infra*.

[77] 96 S. Ct. 1538 (1976).

[78] *Id.* at 1541.

[79] *Id.* at 1542.

[80] *Id.*

[81] Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 936 (7th Cir. 1974).

[82] *Id.* at 737.

[83] 96 S. Ct. at 1545 n.11.

[84] *Id.* at 1546-47.

[85] *Id.* at 1550.

ing public housing or submitting plans; or (4) give up any powers under federal programs or local law.[86]

Thus, the only mandatory segment of the *Gautreaux* remedy would involve federal housing programs which permitted HUD to build in the suburbs by contracting directly with local developers without local approval.[87] Such projects would still be subject to uniformly applied zoning and land use laws. As for programs which required the local governments to approve the use of funds for public housing or make application for such funds, a noncoercive order could not require those local governments to grant approval or make application.[88]

It is hard to conceive of a metropolitan school remedy which does not involve the participation or approval of suburban school districts. Housing may be built in a county without its approval or funding. Even if that housing is all black, some neighborhood integration may be achieved, especially if the projects are small and well dispersed. On the other hand, a school order must entail the placement of students residing in one jurisdiction into schools located in another jurisdiction if integration is to be achieved. Even if tuition funds were provided by the transferring district, such a transfer would require the approval of the suburban school authority, and *Gautreaux* holds that a noncoercive remedy may not mandate such an approval.[89]

Thus, the different characteristics of school and housing remedies suggest that the *Gautreaux* exception to *Milliken* will be confined to housing remedies. Nevertheless, the broad scope of that exception for housing may indirectly affect school integration.

III. Housing and Schools

Racial residential patterns may often affect segregation in schools.[90] Given a neighborhood school system, segregated housing will lead to segregated schools, even absent direct state involvement. While *Milliken* and *Gautreaux* dealt primarily with interdistrict remedies involving either schools or housing exclusively, other cases suggest more complex situations. For example, a violation in housing may produce segregative effects upon both housing and schools, or violations in both housing and schools may produce interrelated segregative effects.

Milliken and *Gautreaux* present two possibilities for relief involving

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[86] *Id.*

[87] *Id.* at 1549-50.

[88] *Id.*

[89] *Id.*

[90] Keyes v. School Dist. No. 1, 413 U.S. 189, 202 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971).

schools and housing. First, in an action which joins both schools and housing, the segregative effect model of *Milliken* suggests that where a violation in housing has produced segregative effects upon schools, the remedy for the housing violation may emcompass schools. This situation might occur within a single district or on an interdistrict basis. Second, the broad housing remedies sanctioned in *Gautreaux* may affect the need for school remedies.

In his *Milliken* concurrence, Justice Stewart suggested a situation in which both schools and housing would be affected in a remedy under the segregative effect approach.[91] If school segregation flows from a "purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transferring pupils across district lines or for restructuring district lines might well be appropriate."[92]

In *Evans v. Buchanan*,[93] a school desegregation case involving Wilmington, Delaware, and its suburbs, the link between housing violations and school segregation was explicitly recognized.[94] The court found that the development of "identifiable black schools mirrored population shifts," and that those shifts resulted in part from "assistance, encouragement, and authorization by governmental policies."[95] For example, it found that public housing policy had contributed to the racial segregation between city and suburbs. While the city housing authority had jurisdiction to build up to five miles beyond the city limits, it had placed over 2,000 units in the city and fewer than 40 in the suburbs.[96] These housing violations provided one of several bases for granting an interdistrict remedy for school segregation.[97]

As previously noted,[97.1] the Seventh Circuit in *United States v. Board of School Commissioners*[97.2] found that housing violations provided an independent basis for an interdistrict school remedy. While the housing authority had jurisdiction outside the inner city, it did not locate any projects in the suburbs. Public housing, which was 98 percent black, was placed exclusively within the Indianapolis city boundaries.

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[91] Milliken v. Bradley, 418 U.S. 717, 753 (1974).

[92] *Id.* at 755.

[93] 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

[94] 393 F. Supp. at 432-35.

[95] *Id.* at 434.

[96] *Id.* at 435.

[97] The court found a history of interdistrict school segregation policies, *id.* at 433-34; a significant governmental involvement in racial discrimination in the private housing market, *id.* at 434-35, and an unconstitutional exclusion of the school districts from a statewide school reorganization plan. *Id.* at 438-43.

[97.1] See text accompanying notes 76.1 through 76.4 *supra*.

[97.2] 541 F.2d 1211 (7th Cir. 1976).

The court concluded that the location of projects helped to cause and maintain school segregation and demonstrated a "purposeful, racially discriminatory use of state housing."[97.3] Enunciating the link between housing discrimination and school segregation the court stated:

> By locating its projects within [the Indianapolis School District] and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within [Indianapolis] and the suburbs.[97.4]

Both *Buchanan* and *Board of School Commissioners* began as school cases and involved violations by school authorities as well as housing authorities. But segregative effects within schools caused by housing violations will support an interdistrict remedy involving schools, even without a violation by the school authority. A pre-*Milliken* case, *City of Black Jack v. United States*,[98] suggests a situation where such a remedy would be appropriate. In *Black Jack*, the court found that a zoning law which barred construction of new multiple family dwellings in the suburbs[99] effectively prevented 85 percent of the blacks in St. Louis from obtaining suburban housing.[100] This confirmed the "inexorable process whereby the St. Louis metropolitan area [became] one that 'ha[d] the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring.' "[101]

While *Black Jack* was framed as a housing case, zoning laws eventually may lead to school desegregation. A remedy to ensure the elimination of the segregative effects of such a law might involve cross-district busing as well as repeal of the ordinance.[102] In rejecting the unclean

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[97.3] *Id.* at 1223, *quoting* Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J., concurring).

[97.4] *Id.* at 1223.

[98] 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[99] 508 F.2d at 1183.

[100] *Id.* at 1186.

[101] *Id.*, *quoting* Mahaley v. Cuyahoga Metro. Housing Auth., 355 F. Supp. 1257, 1260 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974). *See also* Hart v. Community School Bd., 383 F. Supp. 699, 723-26, 747-54, *modified*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

[102] Similarly, in the example derived from Garrett v. Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1973), the housing violation would clearly increase school segregation in both of the districts. In a suit brought to end this school segregation, cross-district busing would be one possible remedy. Alternatively, a remedy to eliminate the effects of the housing violation by requiring the housing authority to provide housing opportunities in the jurisdiction where the black housing had been razed would also eliminate the segregative effects on schools.

hands model as the exclusive route to relief,[103] *Milliken* provided the key to interdistrict remedies involving both schools and housing. If a violation by a housing authority produced segregative effects upon schools, school authorities may no longer oppose the inclusion of their schools in a remedy on the ground that they have committed no independent violation.

IV. Conclusion

The conditions established in *Milliken* and *Gautreaux* for granting interdistrict relief to remedy equal protection violations undoubtedly will have a considerable impact on future litigation. *Milliken*'s segregative effect approach permits interdistrict relief for school violations in numerous situations. In addition, it would permit a remedy which seeks to eliminate the effects of white flight caused by a one-district remedy. *Milliken* also provides several bases for structuring interdistrict relief where multiple violations involving schools and housing are present, or where a violation involving housing has produced segregative effects upon schools and housing alike.

As previously indicated, *Gautreaux* permits housing remedies to encompass a broad metropolitan area where such remedies do not interfere with, or require the permission of, local authorities. This holding gives the federal government and courts the power to structure an alternative to school integration through housing. The funding and encouragement of public housing with a suburban emphasis will lead inevitably to a greater racial balance between the city and its suburbs. Integration of the suburbs will produce integrated schools on a neighborhood basis without resorting to busing. It also will eliminate the incentive for white flight.[104] As in *Gautreaux*, where programs exist to permit public housing in a metropolitan region without local approval, the courts now have the power to require the placement of housing throughout the metropolitan region to remedy past discrimination.

Where the school-housing remedial option is present, a structuring of remedies to achieve both short and long-run results as possible, as well as a selection of remedies with a view toward minimizing social unrest. Thus, while interdistrict busing might be utilized to achieve immediate integration, a metropolitan housing remedy under *Gautreaux* will, over a longer period of time, achieve integrated schools within a neighborhood framework without the need for busing. By reducing the incentive for white flight and eliminating the need for busing,

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[103] 418 U.S. 717, 744-45 (1972).

[104] *See* note 35 *supra*.

such a remedy may produce a more stable, long-range solution to school segregation.

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COMMENTS

THE ATTEMPT TO MONOPOLIZE CHARGE: THE SHERMAN ACT'S ATROPHIED ARM

> *One always should be tentative in suggesting that the Nation faces a watershed on any particular issue at any particular moment. But, I think it can be said that we must soon decide if we are going to continue the slide toward bigger and biger* [sic] *firms and more Government control or give competition one more try.*[1]

The late Senator Philip A. Hart's ominous cry for the decentralization of concentrated industries is gaining a widely respected acceptance.[2] In recent years, great segments of the corporate community have

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[1] 122 CONG. REC. 7153 (daily ed. May 13, 1976)(remarks of Senator Philip A. Hart). Senator Hart was the Chairman of the Senate Antitrust Subcommittee. On May 13, 1976, he introduced an amendment to Section 2 of the Sherman Act. S. 3429, 94th Cong., 2d Sess. (1976). Its purpose is to limit the concentration of industrial power by lessening the burden presently imposed on the government in proving a section 2 actual monopolization charge. He succinctly stated his reasons for the amendment when introducing it on the Senate floor:

> Effective antitrust enforcement ought to become Government's principal form of economic regulation, with the goal of protecting competition by limiting size. Let each company strive to become as big as it can, and when one achieves monopoly power, let it be restructured quickly, and let its part in turn strive to become big.

122 CONG. REC. 7153 (daily ed. May 13, 1976). *See also* S. 3832, 92nd Cong., 2d Sess. (1972) (Industrial Reorganization Act) (The purpose of this bill is to restructure the national economy so that competition will be injected into oligopolistic industries.). When recently introducing the amendment to section 2, however, Senator Hart curtly stated:

> [I]n my opinion passage of the Industrial Reorganization Act is not politically feasible at this time, or in the foreseable [sic] future. That is why I am today proposing an amendment to section 2 of the Sherman Act which would accomplish some of the goals that the Industrial Reorganization Act set out to achieve.

122 CONG. REC. 7153 (daily ed. May 13, 1976). *See generally* Note, *The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy*, 73 COLUM. L. REV. 635 (1973).

[2] *See, e.g.*, M. MINTZ & J. COHEN, AMERICA, INC.: WHO OWNS AND OPERATES THE UNITED STATES 34-75 (1971) ("Evidence has continued to pile up showing there is little relationship between [industrial] size and efficiency."); Scherer, *Economies of Scale and Industrial Concentration*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 16-54 (1974)(found that reductions in industrial concentration are unlikely to threaten losses in efficiency); Whitney, *The Economic Impact of Antitrust: An Overview*, 9 ANTITRUST BULL. 509, 519 (1964); *Priorities in Antitrust: Some Communications*, 1 ANTITRUST LAW & ECON. REV. 11 (1968); *Report of the White House Task Force on Antitrust Policy*, 2 ANTITRUST LAW & ECON. REV. 11, 22-30 (1968)("There is little evidence that economies of scale require firms the size of dominant firms in most industries that are highly concentrated.").

become extremely concentrated, wielding immense, unchecked power.[3] In essence, they have become a very significant part of the federal government, with vast control over the nation's political, social, and economic structure.[4] Justification for their continued existence is coming under repeated attack. Further, there is increasing proof that smaller corporations in the concentrated industries are more competitive and equally, if not more, innovative and efficient than are the larger and more structured corporations in the same industries.[5] It, therefore,

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[3] Concentrated industries are primarily those dealing in the following products or services: chemicals and drugs; electronic computing and communications equipment; electrical machinery and equipment; energy; iron and steel; motor vehicles; and nonferrous metals. These industries were chosen on the basis of multifaceted studies done by the Senate Subcommittee on Antitrust. 118 CONG. REC. 24926 (1972); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (1970), *vacated and dismissed as moot*, 404 U.S. 403 (1972). Dissenting to the dismissal, Mr. Justice Douglas explicitly recognized the power of the large corporation when he stated:

> The modern super-corporations . . . wield immense, virtually unchecked, power. Some say that they are "private governments," whose decisions affect the lives of us all. The philosophy of our times, I think, requires that such enterprises be held to a higher standard than that of the "morals of the market place" which exalts a singleminded, myopic determination to maximize profits as the traditional be-all and end-all of corporate concern.

404 U.S. at 409-10 (Douglas, J., dissenting) (footnotes omitted).

[4] R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 112-14 (2d ed. 1967); *see* M. GREEN, B. MOORE & B. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM 14-26 (1972); W. MUELLER, A PRIMER ON MONOPOLY AND CONCENTRATION 84-126 (1970). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945).

Concern over the corporate grasp of power has also been repeatedly recognized in the legislative branch. *See, e.g.*, 122 CONG. REC. 7152-53 (daily ed. May 13, 1976) ("[There are] corporations large enough to ignore competitive pressures [and] respond to slack demand by maintaining prices and laying off workers rather than by cutting prices to sell more products."); 118 CONG. REC. 24926 (1972) (inflation and unemployment caused by needless industrial concentration); 117 CONG. REC. 34104-08 (1971) (In addition to inflation and unemployment, technological stagnation, inflated costs, and maldistribution of income constitute societal costs paid as a result of unnecessary industrial concentration.).

[5] J. BAIN, BARRIERS TO NEW COMPETITION (1956). *See also* G. STIGLER, THE THEORY OF PRICE 233 (3d ed. 1966); Esposito & Esposito, *Dissolution & Scale Economies: Additional Estimates & Analysis*, 5 ANTITRUST LAW & ECON. REV. 103 (1971); Sherman & Tollison, *Public Policy Toward Oligopoly: Dissolution & Scale Economies*, 4 ANTITRUST LAW & ECON. REV. 77 (1971). M. MINTZ & J. COHEN, *supra* note 2, at 46-49 ("Clearly, bigness is not a necessary prerequisite to invention and innovation. To the contrary, it may well be that highly concentrated industries resist technology and invention unless competition forces them to move ahead."); W. MUELLER, *supra* note 4, at 49 ("[R]ecent research studies are unanimous in their conclusions that productive efficiency dictates high concentration in only a small—and declining—share of all manufacturing.").

The principle that competition in a given industry will increase proportionately to an increase in the number of sellers also has been explicitly recognized by the Supreme Court:

seems contrary to the spirit, if not the letter, of the antitrust laws to allow the continued existence of such large corporations when smaller, efficient, and more competitive corporations can be had without destroying necessary economies of scale.[6] Thus, it is the federal government's responsibility to vigorously restructure our existing corporate community when scale economies will not be unnecessarily sacrificed.[7]

"That '[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists . . . ." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (footnotes omitted).

[6] F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970). Scherer observed that:

> It is evident from studies of scale economies in particular industries and the observation of broad survival patterns that in many and perhaps most American industries *high concentration is not a technological, marketing, or financial imperative.*

Id. at 103 (emphasis added). More recently, Scherer further substantiated the above findings. *See generally* Scherer, *supra* note 2; *see* Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1517-19 (1972).

Judge Learned Hand also emphasized the preference for a number of small producers rather than a concentrated few.

> It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. . . .
>
> . . .
>
> Throughout the history of [the antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake *and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.*

United States v. Aluminum Co. of America, 148 F.2d 416, 427-29 (2d Cir. 1945)(emphasis added).

[7] Enforcement of the antitrust laws in the United States is presently vested in two bodies: the Antitrust Division of the Justice Department, under the direction of the Attorney General, and the Federal Trade Commission (FTC), an independent administrative agency. A synopsis of the history and functions of these two agencies may be found in J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS 8-14 (1969).

The government's record of vigorously pursuing concentrated industries is poor, as incisively revealed in a commentary cited by the Supreme Court. United States v. Pabst Brewing Co., 384 U.S. 546, 553-55 (1966) (appendix to concurring opinion of Mr. Justice Douglas), *quoting* Buchwald, *Washington Post*, June 2, 1966, § A, at 21.

> Every time you pick up the newspaper you read about one company merging with another company. Of course, we have laws to protect competition in the United States, but one can't help thinking that, if the trend continues, the whole country will soon be merged into one large company.
>
> It is 1978 and by this time every company west of the Mississippi will have merged into one giant corporation known as Samson Securities. Every company

Section 2 of the Sherman Act[8] provides a potentially effective tool

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east of the Mississippi will have merged under an umbrella corporation known as the Delilah Company.

It is inevitable that one day the chairman of the board of Samson and the president of Delilah would meet and discuss merging their two companies.

"If we could get together," the president of Delilah said, "we would be able to finance your projects and you would be able to finance ours."

"Exactly what I was thinking," the chairman of Samson said.

"That is a great idea and it certainly makes everyone's life less complicated."

The men shook on it and they sought out approval from the Anti-Trust Division of the Justice Department.

At first the head of the Anti-Trust Division indicated that he might have reservations about allowing the only two companies left in the United States to merge.

"Our department," he said, "will take a close look at this proposed merger. It is our job to further competition in private business and industry, and if we allow Samson and Delilah to merge we may be doing the consumer a disservice."

The chairman of Samson protested vigorously that merging with Delilah would not stifle competition, but would help it. "The public will be the true beneficiary of this merger," he said. "The larger we are, the more services we can perform, and the lower prices we can charge."

The president of Delilah backed him up. "In the Communist system the people don't have a choice. They must buy from the state. In our capitalistic society the people can buy from either the Samson Company or the Delilah Company."

"But if you merge," someone pointed out, "there will be only *one* company left in the United States." "Exactly," said the president of Delilah. "Thank God for the free enterprise system."

The Anti-Trust Division of the Justice Department studied the merger for months. Finally the Attorney General made this ruling. "While we find drawbacks to only one company being left in the United States, we feel the advantages to the public far outweigh the disadvantages."

"Therefore, we're making an exception in this case and allowing Samson and Delilah to merge."

"I would like to announce that the Samson and Delilah Company is now negotiating at the White House with the President to buy the United States. The Justice Department will naturally study this merger to see if it violates any of our strong antitrust laws."

Although recognizing the poor record of the Justice Department in eliminating much of the concentrated industrial economic power, Senator Hart shifted the blame to the federal courts that are ill-equipped to handle antitrust litigation in the proportions needed.

> In the past, the enforcement agencies have built a poor record for attacking existing concentration. In a way that is understandable because even if an existing agency could find the time and personnel to present the big case . . . they would not likely face a court equipped to handle the case.

118 CONG. REC. 24-926 (1972).

[8] 15 U.S.C. § 2 (Supp. IV 1974).

> Every person who shall monopolize, *or attempt to monopolize*, or combine or

for deterring further industrial concentration. Specifically, such an objective can be accomplished by the utilization of the "attempt to monopolize" charge included in section 2 when treated apart from the other section 2 offenses—monopolization and combining or conspiring to monopolize.[9] While the attempt violation is meant to be a separate offense,[10] the vast majority of federal courts repeatedly have obfuscated its meaning by refusing to give it an individual character.[11] When given

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conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Id. (emphasis added). In addition, see 15 U.S.C. § 15 (Supp. IV 1974), which allows private treble damage actions based upon a violation of the antitrust laws.

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

[9] *See* Turner, *The Scope of Antitrust and Other Regulatory Policies*, 82 HARV. L. REV. 1207, 1207-31 (1969) (section 2 can be used to challenge both single-firm and shared-monopoly market structures); 122 CONG. REC. 7153 (daily ed. May 13, 1976) (remarks of Senator Philip A. Hart) ("The appropriate vehicle for dealing with concentrated industries is section 2 of the Sherman Act.").

[10] *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911), in which Mr. Chief Justice White expressly recognized the individual character of the Sherman Act offenses.

> [H]aving by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2nd section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section.

Id. at 61; *accord*, Periodical Distribs., Inc. v. American News Co., 290 F. Supp. 896, 908-09 (S.D.N.Y. 1968), *aff'd per curiam*, 416 F.2d 1330 (2d Cir. 1969); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 460 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969). *See also* Note, *Attempt to Monopolize Under the Sherman Act: Defendants Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451, 1453 (1973).

[11] *See, e.g.*, Walker Process Equip., Inc. v. Flood Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Bowen v. New York News, Inc., 522 F.2d 1242, 1258 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc., 516 F.2d 1092 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975); Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1144 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974); Acme Precision Prods., Inc. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); United States v. Empire Gas. Corp., 393 F. Supp. 903, 909 (W.D. Mo. 1975); United States v. General Motors Corp., 369 F. Supp. 1306, 1308 (E.D. Mich. 1974); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1093 (D. Md. 1969).

its rightful individual character, however, the attempt to monopolize charge should prove to be an invaluable weapon in effectively combating industrial concentration.

The attempt charge's lack of vigor[12] stems from the United States Supreme Court's reluctance to clarify the attempt plaintiff's burden of proof.[13] The lower federal courts have compounded the confusion by injecting various nuances into the burden of proof that must be shown before the plaintiff can find success in an attempt case.[14] Basically, however, there is a readily discernible dichotomy into which the courts can be divided.[15] The division is extreme. While the circuits are unani-

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[12] The ineffectiveness of section 2 of the Sherman Act has been the repeated target of criticism of the following variety.

> [S]ome of you have perhaps been wondering if in fact Section 2 still exists. Senior citizens here will remember it from pre-1953; it kept many of you in 10 suits for years at a time, and I know you miss it more than I do. But it does exist; I've seen it. When I was Don Turner's economic adviser in 1967-68, he showed it to me once when he was polishing it up. There were about 10 industries we considered using it on, but in the end Ed Zimmerman only tried it on IBM. Since then IBM stock has gone up 115 points and the other 9 industries-plus AT&T, whose stock has declined 30 percent since Nicholas Katzenbach wouldn't file the *Western Electric* case-are urging Tom Kauper to use section 2 on them too.

Sheperd, *The Economics: A Pep Talk*, 41 A.B.A. ANTITRUST L.J. 595, 595 (1972).

[13] *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); United States v. Columbia Steel Co., 334 U.S. 495, 532 (1948).

[14] *See, e.g.*, Bowen v. New York News, Inc., 522 F.2d 1242, 1258 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976) (required only proof of intent to monopolize a "designated segment of commerce" rather than a "relevant market"); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) ("The offense of attempted monopolization requires both specific intent to accomplish the illegal result . . . and a dangerous probability of success in that endeavor."); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)("To be successful, an attempt case must establish both an intent to monopolize and a dangerous probability of successful monopolization . . . ."); Hallmark Indus. v. Reynolds Metal Co., 489 F.2d 8, 12 & n.3 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (no proof of dangerous probability required in an attempt case); Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1304, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (although proof of a relevant market was required, it was very narrowly defined—one oil production field); United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961) (dangerous probability of monopolization is not an essential element of proof in an attempt case).

[15] *Compare* Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970) ("In an attempt to monopolize situation, only intent to monopolize is in issue . . . .") *and* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)("We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize.") *with* Coleman Motor Co.

mous in requiring that the plaintiff show *specific intent* to monopolize,[16] a conflict exists as to whether the plaintiff must bear the additional burden of showing that the defendant is *dangerously close* to achieving a monopoly in the relevant market.[17] This additional burden—proof of "dangerous probability" in a relevant market—greatly enhances the difficulty in presenting an attempt case. The reason is simple. If proof of dangerous probability is required, the plaintiff is essentially bela-

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v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975)(specific intent and dangerous probability are essential elements in an attempt case); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295-97 (7th Cir. 1974)(required proof of relevant market and dangerous probability of monopolizing it with specific intent); Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279, 1288 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972)(specific intent in addition to a dangerous probability of success to monopolize required).

[16] *E.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); Bowen v. New York News, Inc., 522 F.2d 1242, 1258 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); Coleman Motor Co. v. Chrysler Corp., 515 F.2d 1338, 1348 (3d Cir. 1975); McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 339 (4th Cir. 1959); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850-51 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Zenith Vinyl Fabrics Corp. v. Ford Motor Co., 357 F. Supp. 133, 143 (E.D. Mich. 1973); Bendix Corp. v. Balax, Inc., 471 F.2d 149, 160-62 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973); Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 386 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1276 (9th Cir. 1975); E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). *But see* Hawk, *Attempts to Monopolize-Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973)(proposes that specific intent be eradicated as a burden of proof in an attempt case).

[17] The requirement to show "dangerous probability" logically implies that the plaintiff must also define the market that the defendant is dangerously close to monopolizing. As one court concisely observed:

> It seems . . . clear, both on authority and logic, that when a charge is made of attempt to monopolize, the first question would be—"to monopolize what?" The answer would seem to be "the relevant market, toward the monopolization of which the attempt was directed."

Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550, 576-77 (D. Md. 1968)(footnote omitted). The inseparability of "dangerous probability" and "relevant market" was also cogently explained by one commentator when he stated:

> If "dangerous probability" has any meaning at all, it must signify an approach to monopoly power. As monopoly power itself is measured in terms of relevant market, so must dangerous probability also be measured. Unless you know where a defendant is heading, you cannot find out how close he is to the destination. *Thus, the concept of dangerous probability is only meaningful in the context of relevant market.*

Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. ANTITRUST L.J. 165, 171 (1967)(emphasis added). *See also* Blecher, *Attempts to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 GEO. WASH. L. REV. 215 (1969); Hawk, *supra* note 16, at 1150-55.

bored with the task imposed in a monopolization case:[18] he must establish a relevant market[19] and, further, prove that the defendant is dangerously close to monopolizing it.[20] Imposition of this additional burden evidences a judicial failure to recognize the existence of the three *separate* offenses delineated by section 2 of the Sherman Act. The effectiveness of the attempt charge is thus largely reduced. This Comment will initially focus on the Supreme Court's efforts to elucidate the plaintiff's burden of proof in an attempt to monopolize case. It will then more closely examine the approaches taken by the various circuits on this issue. Finally, an alternative approach, which would make the attempt charge a viable tool in enforcing the objectives of the antitrust laws, will be suggested.

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[18] When one alleges actual *monopolization*, he has the burden of proving two basic elements: (1) the defendant's possession of monopoly power—power to control prices or exclude competition—in a relevant market, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); and (2) that the defendant purposefully or deliberately acquired or maintained the monopoly power, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[19] The most commonly used definition of relevant market was enunciated by Mr. Justice Reed in the *Cellophane* case (United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)). In essence, he stated that the relevant market is to be defined in terms of the geographic area in which the defendant deals as well as in terms of the product or service in which he is offering, taking into consideration reasonably interchangeable substitutes for the product or service in question (measured by cross-elasticity of demand). *See* Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 299-303 (1956); Note, *The Cellophane Case as Applied in Recent Antitrust Decisions*, 25 GEO. WASH. L. REV. 568 (1957).

The "reasonable interchangeability" test was subsequently refined in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), where the Court recognized that *submarkets* may exist whose boundaries

> may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325; *accord*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 505 n.2 (1969); United States v. Grinnell Corp., 384 U.S. 563, 574 (1966).

Philip Areeda, however, has defined relevant market more simplistically: The relevant market is simply a shorthand phrase used to describe "the arena within which the strength of competitive forces is measured." P. AREEDA, ANTITRUST ANALYSIS ¶ 201, at 71 (1967).

[20] *See* Hibner, *supra* note 17, at 171-77; Smith, *Attempt to Monopolize: Its Elements and Their Definitions*, 27 GEO. WASH. L. REV. 227, 230-31 (1958). These articles stress the necessity for the dangerous probability requirement. *But see* Blecher, *supra* note 17; Turner, *supra* note 19, at 294-95 n.44, 304-308. Blecher and Turner basically argue that proof of the specific intent to monopolize is enough to bring the defendant within the proscriptions of section 2, and that the additional requirement of proving dangerous probability significantly detracts from the prophylactic effect of the section.

I. The Supreme Court

Section 2 of the Sherman Act and, more specifically, the attempt to monopolize charge enumerated in that section, has evolved confusingly with very little legislative clarification.[21] The burden of explaining the import of the attempt charge has fallen largely upon the federal courts[22]—a burden which they have pursued reluctantly.[23] Consequently, a paucity of definitive judicial explication of the true import

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[21] Confusion over the legislature's intent in promulgating the Sherman Act was noticeably prevalent even in the minds of the members of Congress who voted for the Act. An example of such confusion was evidenced in the obviously frustrated remarks of a House member immediately prior to the Act's passage: "God knows, for no man in this House knows, what . . . the [Sherman Act] will cover." 107 Cong. Rec. 4099 (1890).

An attempt to explain the vagueness of the Sherman Act was made in 1898. "The act is necessarily vague, because, in men's minds, the evil dreaded is vague, and like words, therefore, have been used to express it." Dana, *"Monopoly" Under the National Antitrust Act*, 7 Harv. L. Rev. 338, 355 (1898). This type of explanation, however, has not satisfied the significantly mounting number of critics who are calling for legislative modernization of the antitrust laws. See note 1 and accompanying text *supra*. *See generally* J. Burns, *supra* note 7, at 51-78; Letwin, *Congress and the Sherman Antitrust Law*, 23 U. Chi. L. Rev. 221 (1956).

[22] *See* P. Areeda, Antitrust Analysis: Problems, Text, Cases 45 (2d ed. 1974). Professor Areeda basically contends that the vague wording of the Sherman Act was intentional because Congress, rather than shouldering the burden itself, wished to invite the judiciary to establish a federal common law on trade regulation. The general vagueness of the Act is, in part, understandable. In an area as rapidly changing and as complicated as economics, it is virtually impossible to intelligently structure a piece of legislation to ensure its effective endurance over a prolonged period of time. It is possible, however, periodically to append specific legislative clarification and modification to the Act's general objectives. This, it is felt, would come more closely to achieving the objectives adumbrated in the legislative history of the Sherman Act. Moreover, it would place the responsibility of legislating and regulating trade in the political sphere in which it was intended to be placed—the Congress.

[23] For example, Judge Wyzanski, in United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), stated that it is not in the judiciary's province to formulate economic policy. He continued, stating:

> Judges in prescribing remedies have known their own limitations. They do not *ex officio* have economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. They are not so representative as other branches of the government . . . . Judicial decrees must be fitted into the framework of what a busy, and none too expert, court can supervise. Above all, no matter with what authority he is invested, with what facts and opinions he is supplied, a trial judge is only one man, and should move with caution and humility.

Id. at 347-48. Mr. Justice Holmes viewed more cynically the legislature's attempt to further competition by the utilization of the Sherman Act. "I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence . . . ." 1 Holmes-Pollock Letters 163 (M. Howe ed. 1942).

of the attempt violation has emerged.[24]

The Supreme Court's review of attempt claims has largely been in conjunction with one of the other section 2 offenses.[25] Consequently, the distinction between the attempt to monopolize offense and the other section 2 offenses has been blurred. The Court's pronouncements have bewildered the lower federal courts on the issue of the plaintiff's burden of proof in an attempt to monopolize case.[26]

This confusion was initially bred by Mr. Justice Holmes in *Swift & Co. v. United States*.[27] The plaintiff alleged that a combination among meat dealers to influence bidding ultimately would result in price-fixing. The eventual consequence, the allegation continued, would be the monopolization of a portion of the meat-packing industry. In sustaining an injunction against this type of activity, Mr. Justice Holmes stated:

> Intent is . . . essential . . . to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when the intent and the *consequent* dangerous probability exist, [section two] . . . directs itself against that dangerous probability as well as against the completed result.[28]

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[24] *See* Hawk, *supra* note 16, at 1125-35; Rill & Ransom, *The Single Product as a Relevant Market in Attempt to Monopolize Cases*, 26 MERCER L. REV. 823, 827-833 (1975); Turner, *supra* note 19, at 304-08; Note, *supra* note 10, at 1452-59.

[25] *E.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)(primary concern of case was monopolization); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956)(essentially a monopolization case); United States v. Yellow Cab Co., 332 U.S. 218, 226, 229 (1947) (main charge alleged was conspiracy, not attempt); American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946)(appeal on all three section 2 offenses). *See generally* Hibner, *supra* note 17.

[26] *See, e.g.*, Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205 (9th Cir. 1975), *cert denied*, 96 S. Ct. 1741 (1976); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc., 516 F.2d 1092, 1093 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975); Acme Precision Prods., Inc. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Moore v. Jas. H. Matthews & Co., 473 F.2d 328, 332 (9th Cir. 1973); Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1304, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Beaute Craft Supply Co. v. Revlon, Inc., 402 F. Supp. 385 (E.D. Mich. 1975).

[27] 196 U.S. 375 (1905). It should be noted that the *Swift* opinion is primarily concerned with a combination to monopolize as well as obvious section 1 violations (*e.g.*, price-fixing, bid-rigging, black-listing, etc.), all of which would be classified as *per se* violations today.

[28] *Id.* at 396, *citing* Commonwealth v. Peaslee, 117 Mass. 267, 272, 59 N.E. 55 (1901) (Holmes, C.J.) (emphasis added).

Mr. Justice Holmes' promulgation of the plaintiff's burden is unclear and has been interpreted by some courts as imposing a dual burden on the plaintiff.[29] The plaintiff must first present convincing evidence of the defendant's specific intent to monopolize. Once this initial burden is overcome, the plaintiff must then show that the defendant is dangerously close to achieving the forbidden monopoly. Thus, only when both specific intent and dangerous probability are proven will the defendant be held liable for attempting to monopolize. Other courts, however, have read *Swift* to mean that only a specific intent to monopolize must be shown since the dangerous probability is its *consequence*.[30] This interpretation, relieving the plaintiff of the more arduous task of defining a relevant market,[31] creates a burden of proof which is substantially less than the burden imposed in jurisdictions employing the two-tiered approach. Consequently, corporate conduct in one area of the country may escape liability altogether, while identical conduct in another area may run afoul of section 2's attempt prohibition. Such inconsistency poses an as yet unresolved problem for the plaintiff as well as the omnipresent corporation.[32] Instead of clarifying the classic attempt formulation

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[29] *See, e.g.*, Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850-51 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 414 U.S. 1022 (1975); Mogul v. General Motors Corp., 391 F. Supp. 1305, 1313-14 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976).

[30] *See, e.g.*, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1276 (9th Cir. 1975); Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1304, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1093 (D. Md. 1969); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 461-62 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969).

[31] *See* notes 18 through 20 and accompanying text *supra*.

[32] The problem presented was well stated by Mr. Justice Robert H. Jackson when he was Assistant Attorney General in charge of the Antitrust Division of the Justice Department.

> In view of the extreme uncertainty which prevails as a result of these vague and conflicing adjudications, it is impossible for a lawyer to determine what business conduct will be pronounced lawful or unlawful by the Courts. *The situation is embarassing to businessmen wishing to obey the law and to government officials attempting to enforce it.*

J. BURNS, *supra* note 7, at 208 (emphasis added). Moreover, the cry for certainty and predictability has been echoed repeatedly.

> One of the more familiar cries in antitrust enforcement is for more "realism" and more "certainty". Commission and court decisions that go against particular business practices are not infrequently criticized as being economically un-

enunciated in *Swift*, the Supreme Court has befuddled everyone with the *apparent* adoption of both of the above interpretations.[33]

The lower federal courts adhering to the belief that dangerous probability is a separate corequisite in proving an attempt charge have frequently cited the Supreme Court's decision in *American Tobacco Co. v. United States*[34] as explicitly approving this view.[35] In *American Tobacco*, the defendant had petitioned the Court to reverse lower court convictions on three section 2 offenses. It claimed that the jury instruction, on which its attempt liability was founded, was erroneous. The instruction read as follows:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . ."[36]

In granting the petitioner's writ, however, the Court stated that review was "limited to the question of whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act."[37] Although a subsequent petition for enlargement of the scope of review was explicitly denied,[38] various lower courts have cited *American Tobacco* as the Supreme Court's express approval of dangerous probability as a separate element of the attempt offense.[39]

The lower courts' reliance on *American Tobacco* to support the necessity for proving dangerous probability is curious in light of the Supreme Court's subsequent opinion in *United States v. Columbia*

> realistic and, for that reason alone, so inherently unpredictable that the business community could not have reasonably anticipated the rule announced, no matter how diligently it might have been laboring to keep itself in full compliance with the requirements of antitrust.

Mueller, *The New Antitrust: A Structural Approach*, 1 ANTITRUST LAW AND ECON. REV. 87, 127-28 (1967).

[33] *Compare* Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951) *and* American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946) *with* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956) *and* United States v. Columbia Steel Co., 334 U.S. 495, 530-33 (1948).

[34] 328 U.S. 781 (1946).

[35] *E.g.*, Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 (5th Cir. 1969); Mogul v. General Motors Corp., 391 F. Supp. 1305, 1313-14 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976); Telex Corp. v. International Business Machs. Corp., 367 F. Supp. 258, 343 (N.D. Okla. 1973), *rev'd on other grounds per curiam*, 510 F.2d 894 (10th Cir.), *appeal dismissed*, 423 U.S. 802 (1975).

[36] 328 U.S. at 785.

[37] Liggett & Myers Tobacco Co. v. United States, 324 U.S. 836 (1946).

[38] Liggett & Myers Tobacco Co. v. United States, 324 U.S. 891 (1946).

[39] *See* note 35 *supra*.

Steel Co.[40] The government had alleged violations of sections 1 and 2 of the Sherman Act in United States Steel Corporation's acquisition of the assets of the largest steel fabricator on the West Coast. It contended, *inter alia*, that this acquisition constituted an attempt to monopolize the West Coast fabricated steel products market. Initially dismissing the section 1 charge, the Court was quick to state that "even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 *if a specific intent to monopolize may be shown.*"[41] The Court, however, failed to address the necessity for proving a dangerous probability of monopolization. Moreover, it greatly relaxed, if not totally eliminated, the necessity for defining a relevant market when it stated that *"the relative effect of percentage command of a market varies with the setting in which that factor is placed."*[42] *Columbia Steel* has thus been cited for the notion that only specific intent need be shown in an attempt case; dangerous probability being viewed as the inevitable consequence of such intent.[43] This conclusion is reasonable when the cases are approached chronologically. *Swift*'s ambiguous definition of the attempt plaintiff's burden necessitated subsequent clarification. Although the opportunity arose in *American Tobacco*, the Court expressly refused to consider the issue.[44] It was not until *Columbia Steel* that the Court once again considered the attempt charge in an effort to define the plaintiff's burden. It then simply stated that "an attempt to monopolize [is] . . . forbidden by § 2 if a specific intent to monopolize [is] shown."[45]

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[40] 334 U.S. 495 (1948).

[41] *Id.* at 531 (footnote omitted)(emphasis added).

[42] *Id.* at 528 (emphasis added). Prior to the Court's decision in *Columbia Steel*, it was felt that a defendant's share of the market must come very close to an absolute percentage that it took to constitute actual monopolization before one could be found guilty of attempted monopolization. For example, in United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945), Judge Hand announced that 90 percent was sufficient to constitute a monopoly, but 60 percent would be doubtful. *Columbia Steel's* relaxation of the necessity to prove an absolute percentage command led one commentator to conclude that if one does not have to show a strict percentage share of a market in an actual monopolization case, then the necessity to prove that one is very close to approaching a strict percentage would also be unnecessary in an attempt case. Turner, *supra* note 19, at 295-96.

[43] *See, e.g.*, E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1143-44 (9th Cir. 1974); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 598 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); *cf.* Mississippi River Corp. v. FTC, 454 F.2d 1083, 1089 (8th Cir. 1972). *See generally* Turner, *supra* note 19, at 294-96; Note, *supra* note 10, at 1454-55. *But see* Hawk, *supra* note 16, at 1129 n.38.

[44] 328 U.S. at 782.

[45] 334 U.S. at 532.

The Court's lenient definition of relevant market in *Columbia Steel*, which essentially requires the plaintiff to prove only specific intent, is likely attributable to the decisions announced in *United States v. Yellow Cab Co.*[46] and *United States v. Griffith.*[47] *Yellow Cab* was an appeal from a district court[48] dismissal of a complaint that alleged a conspiracy to monopolize the sale of taxi cabs in four cities. The government argued that the market should not be defined on a nationwide scale, but rather that it should be confined to the companies that purchased cabs in the four cities. The Supreme Court accepted neither argument. Stating that the purpose of the Sherman Act was to remove "all appreciable obstructions [to the] statutory policy of free trade," it found a market definition altogether unnecessary.[49]

> [Appellee's] relative position in the field of cab production has no necessary relation to [its] ability . . . to conspire to monopolize or restrain, in violation of the [Sherman] Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient.[50]

This case has subsequently been cited in attempt cases as authority to dispense with the proof of dangerous probability in a relevant market.[51] Concurring with this reasoning, Professor Turner has stated that in light of *Yellow Cab* and *Columbia Steel*, it is only necessary to show that the defendant has a specific intent to monopolize an appreciable segment of commerce.[52] Therefore, the necessity of proving a relevant market is precluded.

> As for definition of market in attempt and conspiracy cases, there was good reason to conclude that *Yellow Cab* and *Columbia Steel* had virtually eliminated the question altogether. "Any part" meant not a properly defined market in the economic sense, but merely a substantial amount of commerce. Specific intent, as shown by coercive conduct or absence of "normal business purpose," apparently became a com-

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[46] 332 U.S. 218 (1947).

[47] 334 U.S. 100 (1948).

[48] United States v. Yellow Cab Co., 69 F. Supp. 170 (N.D. Ill. 1946).

[49] 332 U.S. at 226.

[50] *Id.*

[51] *E.g.*, Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed sub nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969).

[52] Turner, *supra* note 19, at 304.

> plete offense in itself, providing only that a substantial amount of commerce was affected.[53]

In *Griffith*, specific intent was again the only burden explicitly imposed on the plaintiff.[54] The Court, never explicitly rejecting the necessity of proving dangerous probability in a relevant market, implicitly did away with at least a portion of this requirement when it stated:

> Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize *any part* of interstate or foreign trade or commerce.[55]

It has been argued that the *Griffith* Court did not intend for this language to dispense with the necessity of proving "dangerous probability."[56] Although the Court did not explicitly recognize the necessity for such proof, it nevertheless did so inferably. In other words, the Court's recognition of the appellee's monopoly power in one market as a substantial source of leverage, possibly enabling it to monopolize another area of commerce, constituted a recognition of power that could bring the appellee dangerously close to controlling a significant area of commerce. This reasoning, however *arguendo*, does not resolve the question of whether *Griffith* also required the plaintiff to establish a relevant market in which the defendant's conduct could be evaluated. Did the Court intend for the plaintiff to show only that the defendant was dangerously close to foreclosing a "part of interstate or foreign trade or commerce;"[57] or was the Court's intention for the plaintiff to bear the more onerous burden of proving a dangerous probability of monopoliza-

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[53] *Id.* at 294. *But see* Hibner, *supra* note 17, at 170.

[54] In *Griffith*, the appellees had theatres in 85 towns, 53 of which they totally dominated. The Government alleged violations of sections 1 and 2 of the Sherman Act contending that the monopoly power in 62 percent of the towns gave the appellees a better bargaining position with the film distributors, resulting in better than competitive terms in the towns where competition existed. Even though no evidence existed that the appellees egregiously used their monopoly power in one area to retain an advantage in another, the Court agreed with the Government: "Monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 though it remains unexercised." 334 U.S. at 107. Thus, it should be noted that *Griffith* did consider potential use of appellees' monopoly power in one market in an attempt to monopolize another. Therefore, one should be cautious in giving *Griffith* too much precedential value when "attempting to monopolize" is the only relevant consideration.

[55] 334 U.S. at 106-07 (footnote omitted)(emphasis added).

[56] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973). *See generally* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375, 403-05 (1974).

[57] 334 U.S. at 106-07. See note 17 *supra*.

tion in a relevant market; or did the Court intend for the plaintiff to be required to show dangerous probability at all? Again, one is faced with an ambiguous opinion reminiscent of *Swift*. This ambiguity has defied resolution as well as confounded the reasoning of the lower courts.[58]

In 1951, the Supreme Court again had the opportunity to completely eliminate the confusion surrounding the plaintiff's burden in an attempt case. It did not, however, resolve the ambiguities. In *Lorain Journal Co. v. United States*,[59] the Court was confronted with the charge of attempting to monopolize. Such was explicitly recognized by Mr. Justice Burton's opening sentence in the majority opinion: "The principal question here is whether a newspaper publisher's conduct constituted an attempt to monopolize interstate commerce . . . ."[60] Oddly enough, however, the opinion neglected to clearly delineate the elements of the attempt offense. In *Lorain Journal*, the appellant had enjoyed a substantial monopoly in the dissemination of news and advertising in Lorain, Ohio.[61] In 1948, competitors established a radio station, WEOL, in the Lorain area. This gave the Journal unwanted competition in the sale of advertising. In an effort to combat the new competition, the Journal refused to offer advertising space to anyone who advertised on WEOL. The district court found in this conduct a clear intention to destroy the broadcasting company so that the Journal could once again enjoy monopoly power in Lorain.[62] Affirming the lower court, the Supreme Court held that the appellant's conduct was a clear attempt to monopolize the area covered by WEOL.[63] It further recognized that if the appellant was allowed to continue such conduct, its once prevalent monopoly in Lorain would be reestablished. In reaching this result, the Court did not articulate a necessity to define the relevant market. Furthermore, the closest it came to imposing the burden of proving a dangerous probability of monopolizing was in its recitation of the oft-cited

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[58] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co., 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1968); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed sub nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945).

[59] 342 U.S. 143 (1951).

[60] *Id.* at 144.

[61] In *Lorain Journal*, the relevant market was composed of a newspaper and radio station. The Eighth Circuit, however, has subsequently differentiated between these two types of media and, accordingly, refused to place them in the same relevant market. Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 386 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). *See generally* Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968).

[62] 92 F. Supp. 794 (N.D. Ohio 1950).

[63] 342 U.S. at 157.

statement from *Swift*.[64] Consequently, the only clear conclusion to be drawn from the opinion in *Lorain Journal* is that specific intent to monopolize remains a necessary element of the plaintiff's proof in an attempt case. Whether dangerous probability and relevant market were also necessary elements of proof, the Court did not explicitly answer. This opinion nevertheless has been cited in attempt cases as authority for requiring the plaintiff to prove dangerous probability in a relevant market.[65] Those in disagreement with the Court's interpretation in *Lorain Journal* have been quick to cite a subsequent opinion which seemingly eliminated the necessity of proving market power in an attempt case. In *United States v. E.I. du Pont de Nemours & Co.*,[66] the celebrated *Cellophane* case, the Court contrasted the plaintiff's burden in an attempt or conspiracy case with the burden imposed in a monopolization case. It was essentially stated in footnote 23 that market power and market definition are unnecessary in attempt and conspiracy cases, whereas, a definition of the market and the defendant's power within that market is a necessary element of proof in a monopolization case.[67] While the "true" intent of the oblique footnote inevitably has remained much debated,[68] it has led Professor Turner to state:

> The kind of conduct that typically established the requisite "specific intent" in attempt and conspiracy cases is clearly conduct which has no social or economic justification. . . . If defendants are attempting to drive someone out of the market by foul means rather than fair, there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes.[69]

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[64] *Id.* at 153.

[65] *E.g.*, Bowen v. New York News, Inc., 522 F.2d 1242, 1252 n.7 (2d Cir. 1975); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 851 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Kreager v. General Elec. Co., 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974). *But see* E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); Mogul v. General Motors Corp., 391 F. Supp. 1305, 1313-14 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976). *See generally* Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 GEO. WASH. L. REV. 227, 234 (1959); Note, *supra* note 10, at 1457.

[66] 351 U.S. 377 (1956).

[67] *Id.* at 395 & n.23.

[68] *See* Becher, *supra* note 17, at 218; Hibner, *supra* note 17, at 170 & n.27; Turner, *supra* note 19, at 304-05, 307.

[69] Turner, *supra* note 19, at 305.

He concluded, therefore, that

> [i]t is reasonable to discard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may appropriately be condemned per se.[70]

Although the Court is not likely to accept Professor Turner's per se approach in the near future, it has indicated a willingness to relax the plaintiff's burden of proof. When it has directly confronted market power in attempt cases, the Court has rejected the necessity of such proof.[71] It would not be wise, however, to summarily dismiss the opinions implicitly recognizing that proof of market power is necessary.[72] These opinions have been forcefully utilized by a majority of the lower courts to require the plaintiff to prove dangerous probability in a relevant market.[73] Thus, they continue to play a significant role in the struggle to delineate the burden the plaintiff must bear in an attempt case.

A survey of the attempt to monopolize decisions clearly indicates that the Supreme Court has been nothing short of inconclusive in its delineation of the plaintiff's burden in such cases. As the corporate community unjustifiably becomes more concentrated, however, the Court's decisions will likely become more closely aligned with the suggestion offered by Donald Baker when he was the Director of Policy Planning for the Antitrust Division of the Department of Justice:

> Monopolization is basically a structural offense and therefore relevant market and position in it are important considerations. Attempted monopoly is basically a conduct offense; and, where we are dealing with conduct which is clearly predatory and unfair, there is no public policy reason for protecting it from judicial sanction. *To eliminate the "dangerous probability" and "market" requirements from Section 2 attempt to monopolize cases would make it a much more effective tool for dealing with indefensible single firm conduct.*[74]

Implementation of such a policy objective would give the attempt charge a character of its own, making it a viable weapon in antitrust enforcement.[75]

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[70] *Id.* at 307.

[71] See United States v. Columbia Steel Co., 334 U.S. 495 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[72] *E.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[73] *E.g.*, Sulmeyer v. Coca Cola Co., 515 F.2d 835, 851 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 386-87 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974); Walker v. Providence Journal Co., 493 F.2d 82 (1st Cir. 1974); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).

[74] 5 C.C.H. Trade Cases ¶ 50,145, at 55.247 (1972) (emphasis added).

[75] Telex Corp. v. International Business Machs. Corp., 367 F. Supp. 258, 343 (N.D.

II. The Lower Courts and Attempt to Monopolize

The lower federal courts are understandably confused over what burden should be imposed on a plaintiff in an attempt case. The Supreme Court's failure to provide concise, definitive guidance on this issue repeatedly has confounded the circuit courts. Such is well illustrated by the diametrically opposed interpretations of the *Swift* decision among[76] as well as within the circuits.[77] Basically, however, the lower federal courts have followed a readily perceptible pattern in attempt cases.[78] There are two general approaches. Some courts have viewed the attempt charge as a mere extension of the monopolization charge,[79] greatly negating the salutary effect it would have if treated as a separate violation. They have strictly required the plaintiff to plead and prove definition of a relevant market, dangerous probability that the defendant will monopolize such market, and that such market power resulted from a specific intent to monopolize. Other courts, however, have been more lenient. Instead of requiring proof of dangerous probability in a relevant market, they have required that the plaintiff show only the

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Okla. 1973), *rev'd on other grounds*, 510 F.2d 894 (10th Cir.), *appeal dismissed*, 423 U.S. 802 (1975).

[76] *Compare* Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850-51 (5th Cir. 1975), *cert denied*, 424 U.S. 934 (1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), *with* Hallmark Indus. v. Reynolds Metal Co., 489 F.2d 8, 12 n.3 (9th Cir. 1973), *cert denied*, 417 U.S. 932 (1974); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 586 (10th Cir. 1961), *cert. dismissed sub nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1093 (D. Md. 1969).

[77] The Ninth Circuit's disposition of attempt claims best illustrates the confusion that exists within a circuit as to the specific elements a plaintiff must plead and prove in an attempt case. *Compare* Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1741 (1976)("specific intent" plus " 'likely probability' of monopolization") *and* Moore v. James H. Matthews & Co., 473 F.2d 328, 332 (9th Cir. 1973)("[A]ttempt to monopolize . . . does not require proof of monopoly power. Proof that there is a 'dangerous probability of success' is certainly enough.") *with* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1276 (9th Cir. 1975) ("[E]vidence of market power is relevant but 'not indispensable . . .' [in an attempt case].") *and* Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970) ("In an attempt to monopolize situation, only intent to monopolize is in issue . . . .").

[78] *See* notes 15 through 20 and accompanying text *supra*.

[79] *See, e.g.*, Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295-97 (7th Cir. 1974); Acme Precision Prods., Inc., v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279, 1288 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972).

defendant's specific intent to monopolize.[80] Judicial recognition of this less onerous burden has done much to give the attempt charge an individual character. This latter, "specific intent" approach, however, only recently has attained a significant judicial following.[81]

A. *Dangerous Probability of Monopolization in a Relevant Market*

In a majority of the circuits, the plaintiff, aside from proving specific intent to monopolize, must show that the defendant is dangerously close to monopolizing a defined market.[82] Thus, once the plaintiff has overcome the initial burden of proving specific intent, he is then taxed with the additional burden of defining a relevant geographic and product market[83] and proving that the defendant is dangerously close to monopolizing that market. Retention of this requirement, it is argued, is advantageous.[84] It enables the courts to adjudge the guilt or innocence of a defendant on something more than what is often found to be abstruse conduct. It allows the courts to structurally, as well as subjectively, analyze the defendant's actions within a carefully defined area.[85] However, the advantages and, moreover, the necessity of this requirement are far outweighed by the disadvantages. It is well known that an attempt to monopolize is meant to be a *separate* offense of section 2 of the Sherman Act.[86] This was specifically recognized by Chief Justice White in *Standard Oil Co. of New Jersey v. United States*.[87] To confuse

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[80] *See, e.g.*, Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1144-45 (9th Cir.), *cert denied*, 419 U.S. 1023 (1974); Hallmark Indus. v. Reynolds Metal Co., 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 581 (10th Cir. 1961), *cert. dismissed sub. nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 461-62 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969).

[81] See note 119 *infra*.

[82] *E.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295-97 (7th Cir. 1974); Kreager v. General Elec. Co., 497 F.2d 468, 471 (2d Cir.), *cert denied*, 419 U.S. 861 (1974); Scranton Constr. Co. v. Litton Indus. Leas. Corp., 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); Morning Pioneer, Inc. v. Bismarck Tribune Co., 593 F.2d 383, 386 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

[83] *See* Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 279 (1934)("The provisions of §§ 1 and 2 have both a geographical and distributive significance . . . .").

[84] *See generally* Hibner, *supra* note 17; Smith, *supra* note 65.

[85] Note, *supra* note 10, at 1459-64. *See generally* Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. ANTITRUST L.J. 165, 173-77 (1967).

[86] *See* note 10 and accompanying text *supra*.

the elements of a monopolization case—definition of a relevant geographic and product market, and defendant's percentage command of that market—with the elements of an attempt case improperly amalgamates the attempt to monopolize offense with the offense of actual monopolization. Moreover, the potentially beneficial effect of the attempt charge is substantially sacrificed. In turn, much anticompetitive conduct falling within the prohibitive ambit of section 2 goes unchecked.[88]

The unfortunate consequence developed by this problem was recently evidenced in *Coleman Motor Co. v. Chrysler Corporation*.[89] The plaintiff had, for a number of years, enjoyed the sole retail dealership of Dodge automobiles in a portion of Allegheny County, Pennsylvania. Chrysler Corporation felt that by establishing a wholly-owned subsidiary in this area of the county, it could reap higher profits as well as obtain a tighter grip on its retail market. Therefore, it established its own dealership in the area and cut prices enough to drive the plaintiff out of business. The plaintiff alleged that this was a calculated conspiracy and an attempt to monopolize. In submitting the attempt charge to the jury, the district court defined the relevant market as the retail sale of Dodge automobiles in Allegheny County.[90] On appeal, the Third Circuit, essentially agreeing with the defendant that the market should be defined more broadly, stated: "The relevant product market is composed of products 'that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.' "[91] While the case was remanded to the district court,[92] the Third Circuit made it clear that, on remand, Chrysler's conduct was not to be evaluated in a market limited to Dodge automobiles, but rather that it should be evaluated in a broader market composed of all automobiles similar to Dodge—"price, use and qualities considered."[93] This placed an insurmountable burden on the plaintiff to prove that the Dodge dealerships in Allegheny County, solely controlled by Chrysler, were dangerously close to monopolizing a market which included both Ford

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[87] 221 U.S. 1, 61 (1911).

[88] The biggest single complaint of "unchecked" conduct is the predatory pricing policies of single firms and oligopolies. *See* Cooper, *supra* note 56, at 408-11; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

[89] 525 F.2d 1338 (3d Cir. 1975).

[90] *Id.* at 1349 & n.18.

[91] *Id.* at 1349, *quoting* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956).

[92] 525 F.2d at 1349.

[93] 525 F.2d at 1348-49 (citation omitted).

and General Motors automobiles. Surely no one, not even Chrysler (much less its Dodge Division), expects to come dangerously close to monopolizing a market composed of the various lines of General Motors and Ford cars. The circuit court thus gave Chrysler the license to use its "deep pocket"[91] to arbitrarily eliminate any unwanted competition in the sale of its own cars. It thereby allowed predatory conduct to escape judicial prohibition. In essence, the court's reasoning allowed a large national corporation to monopolize as much of a retail market as it could reasonably hope to monopolize.

The holding in *Coleman Motor Co.* is the rule rather than the exception in a confused line of attempt cases decided at the circuit court level.[95] Consequently, the plaintiff very rarely has found success when alleging an attempt to monopolize. When he has been successful, the court usually has been "forced" to decide in his favor simply because to do otherwise would inevitably give the defendant monopoly power. For example, in *Morning Pioneer, Inc. v. Bismarck Tribune Co.*,[96] the court, although defining the market broadly, was seemingly compelled to decide in the plaintiff's favor. The defendant owned the largest daily newspaper in Bismarck, North Dakota. In order to expand its market, the Tribune "blanketed" Mandan, North Dakota, with its evening newspaper, free of charge. The plaintiff, who owned the only local newspaper in Mandan, alleged that the defendant's conduct constituted an attempt to monopolize. If this conduct continued, the complaint stated, the plaintiff would inevitably be forced out of the market, and the Tribune would assume total market control. The district court found for the plaintiff and on appeal, the circuit court began its opinion by stating:

> To establish an "attempt to monopolize" in violation of § 2 of the Sherman Act, it is necessary to prove: (1) a specific intent to monopolize; (2) an overt act or acts; and (3) a dangerous probability of monopolization of a specific product market in a particular geographic market.[97]

The court subsequently found the market to be composed of all "daily newspaper[s] in southwestern North Dakota."[98] Despite this expansive

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[91] In an antitrust context, the expression "deep pocket" means that, in an attempt to monopolize a given area, a corporation can suffer losses in order to drive out competition. In turn, the losses suffered in the one area are usually recompensed in another area where the competition is much less intense. If the corporation is very wealthy, however, it can afford to draw from its "deep pocket" without having to make up the loss elsewhere.

[95] *See* note 82 *supra*.

[96] 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

[97] 493 F.2d at 386.

[98] *Id.*

market definition, the court found for the plaintiff. In reaching its conclusion, the court stated that

> [t]he intent to monopolize was adequately shown by the Tribune's distribution of thousands of free newspapers . . . . Much of the blanketing . . . was done on Wednesday, the heavy grocery ad days. It was sometimes accompanied by an appeal to Mandan grocery advertisers to place ads on those days. Because advertising constituted eighty percent of the [plaintiff's] revenue and a significant portion of that revenue came from grocery advertising, the dangerous probability that the [plaintiff] would be driven out of business by a continuation of the practice is evident.[99]

The *Coleman Motor Co.* and *Morning Pioneer* decisions indicate the general mood of a majority of the circuit courts. This mood, however, is not steadfast. In some circuits, timidity best describes the judicial attitude.[100] This is well-illustrated by *Campbell Distributing Co. v. Joseph Schlitz Brewing Co.*,[101] in which the court seemed persuaded by the argument that proof of dangerous probability should not be required. In a moment of indecisiveness, it stated, "the beginnings of illegal conduct should be condemned as much as the illegal end result . . . . [A] monopolist must begin somewhere; his illegal ultimate objective should be nipped in the bud."[102] The court concluded, however, that it was compelled by the "weight of authority" to require the plaintiff to prove a dangerous probability that monopoly power would be acquired if not checked.[103] Similarly, in *Woods Exploration & Producing Co. v. Aluminum Co. of America*,[104] the Fifth Circuit recognized that "[t]here cur-

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[99] *Id.* at 386-87.

[100] E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); Bowen v. New York News, Inc., 522 F.2d 1242, 1258 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 598 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); Cornwell Quality Tools Co. v. C.T.S. Inc., 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Bernard Food Indus., Inc. v. Dietone Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); Beaute Craft Supply Co. v. Revlon, Inc., 402 F. Supp. 385, 388 (E.D. Mich. 1975); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 60 (D. Ore. 1973); Huron Valley Publishing Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 662 (E.D. Mich. 1972).

[101] 208 F. Supp. 523 (D. Md. 1962).

[102] *Id.* at 529.

[103] *Id.* at 528-30. The court stated:

> There remains to be determined the quantum of proof needed to establish "a dangerous probability that a monopoly [would] be effectuated. . . ." With regard to violations arising under § 2 of the Sherman Act, there is a surprising lack of authority on this point.

Id. (citation omitted).

[104] 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

rently exists some dispute over whether . . . attempts to monopolize . . . require proof of the relevant market or ability to achieve monopoly power."[105] Curiously, however, the court neglected to state the position to which it adhered.[106]

Other circuits, though overtly retaining the dangerous probability requirement, have partially avoided its harsh results by narrowly defining the market in which the defendant's conduct is to be evaluated. Instead of strictly adhering to the definition of relevant market adumbrated in the *Cellophane* case, the courts have leaned in a less restrictive direction. Evaluation of the defendant's conduct has been in a market not tightly defined by cross-elasticities and substitutability, but rather in terms of the uniqueness of the product,[107] buyer preference,[108] and the defendant's economic advantage in the market.[109] Moreover, in some instances, courts have gone so far as to define the market as simply the single product of the defendant.[110] For example, in *United States v. Klearflax Linen Looms, Inc.*,[111] the market was limited to linen rug manufacturers. Oddly enough, the defendant was the only manufacturer of such rugs, his business comprising less than one-half of 1 percent of the total rug business in the United States. More recently, in *Calnetics Corp. v. Volkswagen of America, Inc.*,[112] the plaintiff, a manufacturer of automobile air conditioners, limited his manufacturing pro-

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[105] 438 F.2d at 1305 (footnote omitted).

[106] Although the court did not explicitly state that a dangerous probability of monopolizing a relevant market was not a necessary matter of proof, it inferably weakened the necessity for such proof by narrowly defining the market as one oil production field. *Id.* at 1304. It should be noted, however, that even though the *Woods* court was indecisive as to the necessity of carefully defining a relevant market and further proving that the defendant is dangerously close to monopolizing it, subsequent Fifth Circuit opinions have explicitly adopted the need to prove dangerous probability in a relevant market. *E.g.*, Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972).

[107] *See, e.g.*, Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 & n.2 (1969); Bushie v. Stenocord Corp., 460 F.2d 116, 121 (9th Cir. 1972). *See generally* 60 VA. L. REV. 884, 891-92 (1974).

[108] *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1961). *See generally* Comment, *Monopoly-Relevant Market:* Telex v. I.B.M., 5 RUTGERS J. OF COMPUTERS AND THE LAW 171, 174 (1975).

[109] *See, e.g.*, Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 & n.2 (1969).

[110] *E.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973); Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D. Cal. 1972); Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348 (D. Del. 1962).

[111] 63 F. Supp. 32 (D. Minn. 1945).

[112] 348 F. Supp. 623 (C.D. Cal. 1972).

cess specifically to air conditioners for the Volkswagen. When Volkswagen acquired one of Calnetics' competitors, Calnetics charged Volkswagen with violating the antitrust laws. In evaluating the gravity of the defendant's conduct, the court defined the relevant market as air conditioners used in Volkswagen cars.[113] It is evident, therefore, that the judicial timidity evidenced in *Campbell Brothers* can be overcome without expressly discarding the necessity to prove dangerous probability in a relevant market. It can effectively be accomplished by the court's acceptance of a narrowly defined relevant market. This argument logically follows the reasoning that the smaller the market in which the defendant's conduct is to be evaluated, the less onerous is the plaintiff's burden in an attempt to monopolize case.

The most unique approach adopted in response to an attempt charge was recently evidenced in *Telex Corp. v. International Business Machines Corp.*[114] Although retaining the dangerous probability requirement,[115] Judge Christensen departed from its traditional application when he cogently stated:

> [T]he precise boundaries of relevant markets and the likelihood of success in and of themselves become less important in attempt to monopolize cases as aggressive predatory intent and conduct emerge more clearly.[116]

This formula, combining the best of both worlds, is the most workable.[117] Even though it retains the requirement of dangerous probability, it does not strictly adhere to traditional notions of market definition and defendant's precentage command of that market. Instead, the *Telex* formula increases the emphasis on dangerous probability when predatory conduct is small and, in turn, decreases its emphasis on dangerous probability when predatory conduct is great. This engenders a balancing process in which the specific conduct and size of the defendant more clearly determine his guilt than does the application of a rigid formula.

Strict adherence to a traditional definition of relevant market[118] and proof of the defendant's dangerous probability of monopolizing such

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[113] *Id.* at 624-25.

[114] 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd on other grounds*, 510 F.2d 894 (10th Cir. 1975), *appeal dismissed*, 423 U.S. 802 (1975).

[115] 367 F. Supp. at 342.

[116] *Id.* at 343.

[117] *See* P. AREEDA, *supra* note 22, at 258; Boone, *Single-Corporation Competitive Torts and the Sherman Act: A Projection Based Upon a Review of the* Albert Pick, Atlantic Heel, *and* Perryton *Cases*, 2 GA. L. REV. 372, 375-76 (1968).

[118] The definition of the relevant market is meant to be in line with the requisites delineated in the *Cellophane* case.

market will do much to hamper the effectiveness of the attempt charge. Exclusionary conduct and predatory actions will go unchecked and the goal of encouraging competition will, consequently, suffer. Justifications for keeping the rule—deterring spurious antitrust actions, and preserving the ability to adjudge a defendant's conduct on something more than subjective actions—are far outweighed by the economic and policy objectives that will be sacrificed if the traditional application is not abandoned.

B. Specific Intent to Monopolize

The necessity of proving the defendant's dangerous probability of monopolizing a relevant market has been dispensed with in a substantial number of attempt cases.[119] These decisions require only that the plaintiff prove the defendant's specific intent to monopolize.[120] In so doing, these courts have substantially dispensed with the necessity of proving a relevant market in which to evaluate the defendant's conduct.[121] Therefore, in jurisdictions adhering to this "specific intent" approach, the attempt plaintiff need prove only that the defendant has a specific intent to monopolize "any part of the trade or commerce," thus relieving the plaintiff from the arduous task of delineating *Cellophane*[122]

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[119] *See* note 80 *supra*. The development of the specific intent formula in attempt cases can be traced clearly in four cases. In Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 598 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972), the court, confronting the attempt charge, stated that the actual likelihood of the defendant obtaining monopoly power was not the appropriate test. Rather, the defendant's size, his intent, and the "nature of his overt actions" are what should be assessed in adjudging one's attempt to monopolize. The court in Huron Valley Publishing Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 662 (E.D. Mich. 1972), substantially emasculated the necessity to prove the defendant's conduct in a relevant market, stating that "market definitions may be somewhat more attenuated than in monopolization cases." Thus, although requiring the plaintiff to prove a relevant product and geographic market, the court did not impose on the plaintiff the necessity of strictly proving the relevant market as in monopolization cases. In Bushie v. Stenocord Corp., 460 F.2d 116, 121 (9th Cir. 1972), the court substantially relaxed the plaintiff's burden vis-à-vis the proof required in *Giddings* and *Lewis*. It essentially stated that although specific intent is the only necessary element of an attempt violation, to constitute a specific intent the defendant must be guilty of engaging in some form of conduct that, if not checked, would bring him dangerously close to actual monopolization. Finally, in Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), the court explicitly rejected the necessity to prove dangerous probability in a relevant market when the defendant's specific intent to monopolize is clearly evident.

[120] *See* cases cited note 119 *supra*. *See generally* Cooper, *supra* note 88, at 418-24.

[121] *See* Note, *Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market*, 42 N.Y.U.L. REV. 110 (1967); Note, *Attempt to Monopolize: The Offense Redefined*, 1969 UTAH L. REV. 704.

[122] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389 (1956). See notes 52 through 53, 69 through 70 and accompanying text *supra*.

product and geographic markets. This, in turn, makes the attempt offense a more expansive tool in antitrust enforcement.

Justification for omitting the separate requirement of dangerous probability in a relevant market was well stated by one commentator when he said: "[C]urrent efforts to expand the category of attempts to monopolize is to create *a self-contained competitive wrong independent of any direct relationship to monopolization.*"[123] This is accomplished by requiring the plaintiff to prove only the defendant's specific intent. It allows the victim of egregious anticompetitive conduct protection from the larger, more sophisticated corporations. It is a formula which offers effective protection within the ambit of section 2 of the Sherman Act, while simultaneously precluding the necessity to prove the essential elements of a monopolization offense. Thus, requiring proof only of specific intent removes the emasculating effect of the dangerous probability requirement. In this context, adoption of the specific intent formula gives the attempt offense a character of its own.

The foremost decision accepting this approach is *Lessig v. Tidewater Oil Co.*[124] The plaintiff alleged that in terminating a service station lease and dealer contract, Tidewater violated sections 1 and 2 of the Sherman Act,[125] as well as section 3 of the Clayton Act,[126] by fixing retail gasoline prices and requiring its retail operators to buy tires, batteries, and accessories exclusively from Tidewater or from one of its sponsorees.[127] Specifically addressing the section 2 attempt claim, the court left no doubt as to its view of the dangerous probability requirement: "We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. . . . [Furthermore] the relevant market is not in issue."[128] In reading the *Lessig* opinion, one should be careful not to interpret it as completely doing away with

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[123] Cooper, *supra* note 88, at 408 (emphasis added).

[124] 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

[125] See note 8 *supra*.

[126] 15 U.S.C. § 14 (1970) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodiities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen or tend to create a monopoly in any line of commerce.

[127] 327 F.2d at 463.

[128] *Id.* at 474 (footnote omitted).

market definition and dangerous probability.[129] In fact, the *Lessig* court stated that although "specific intent itself is the only evidence of dangerous probability the statute requires," proof of the defendant's dangerously close position to monopoly power "may be relevant circumstantial evidence" when the defendant's intent is in question.[130] Thus, where the defendant's specific intent is clearly unquestionable, proof of the defendant's position in the relevant market is "not in issue." However, if the defendant's conduct is not so predatory as to present a clearly evident "intent," proof of probability of actual monopolization is permissible to show that specific intent does exist. Yet, even though such proof is permissible, the court in no instance casts this burden on the plaintiff.

It has been argued that this approach deleteriously affects competition. All competitive activity is to some degree exclusionary. Therefore, if the plaintiff is only required to prove a defendant's specific intent to monopolize a segment of commerce, much truly competitive activity will be thwarted out of fear of running afoul of the harsh penalties of the antitrust laws.[131] Therefore, in order to state a valid cause of action under section 2's attempt to monopolize prohibition, it is necessary to define a relevant market in which to evaluate the defendant's conduct. It is difficult to perceive how one can be held in violation of attempting to monopolize without a court being inevitably compelled to define a relevant market, either broadly or narrowly, in which to determine the defendant's guilt. As one court cogently stated:

> It seems . . . clear, both on authority and logic, that when a charge is made of attempt to monopolize, the first question would be—"to monopolize what?" The answer would seem to be "the relevant market, toward the monopolization of which the attempt was directed."[132]

Although the specific intent formula provides the attempt offense with a much needed individuality, it goes too far in lessening the plaintiff's burden of proof since it creates the possibility of *de minimis* anti-

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[129] *See* Blecher, *supra* note 17, at 218. Blecher has interpreted the *Lessig* opinion very neatly.

> Once the "illegal" intent has been proven, no amount of relevant market facts would constitute a defense. But where the intent itself is in issue the relevant market facts, to the extent that they bear on the question of intent, obviously must be admitted and weighed by the jury in light of all the other facts and circumstances used in reaching its conclusion.

Id. at 219.

[130] 327 F.2d at 474.

[131] *See* Hibner, *supra* note 17; Smith, *supra* note 65.

[132] Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550, 576-77 (D. Md. 1968)(footnote omitted).

trust litigation which does not serve the objectives of the section 2 attempt offense. It is thus necessary to formulate a more effective test by utilizing the advantageous aspects of each extreme formula.

III. Alternative and Conclusion

The attempt to monopolize offense has been repeatedly confused and often amalgamated with the other section 2 offenses and has been denied its intended individual posture in antitrust litigation. Confronted with confusing standards generated by the Supreme Court, the circuits have retreated to separate corners on the issue of the plaintiff's burden of proof in an attempt case. Although each extreme view contains commendable qualities, standing alone, each lacks the quality of making the attempt charge a viable tool in antitrust enforcement.

It is evident that adherence to the specific intent plus dangerous probability formula leaves a significant amount of anticompetitive conduct unchecked. However, the reformulation of the attempt offense which imposes the lesser burden of proving only specific intent does much to stifle vigorous competition. Therefore, it is imperative that a more viable formula be adopted. This task can be effectively accomplished by adopting selected portions from the two extreme views which presently exist.[133] The upshot would be a balancing approach in which specific intent and market power would be alternative requirements that vary in inverse proportion to the offensiveness of the defendant's conduct.[134] The larger the defendant firm charged with attempt to monopolize, the less heavily the firm's specific intent to monopolize will be weighed in determining guilt or innocence. The viability of this alternative approach is best illustrated through hypothesis.

Corporation *A* is a well established manufacturer of electronic data processing equipment. It is primarily engaged in the construction of mainframe computers and smaller peripheral computers. The peripheral computer is effective only when it can be plugged into the terminal of the larger mainframe computer. Without the plug compatibility of the mainframe, the peripheral computer is virtually ineffective.

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[133] It would be ideal if a judge were provided with a checklist by which to measure a defendant's conduct in an attempt case and mechanically determine his guilt or innocence. However, this is not practicable. Antitrust policy and, moreover, economic realities are much too complicated to provide an exact, mechanical formulation. In order to effectively adjudge the gravity of a defendant's conduct, the judiciary must be given a degree of independent discretion when applying the law to a particular set of facts. The degree of discretion, however, should be tightly circumscribed by the legislature in order to bring predictability to the attempt offense. This would obviate a mechanical approach to the attempt charge, but at the same time promote consistency throughout the various circuits.

[134] *See* P. Areeda, *supra* note 22, at 258; Cooper, *supra* note 88, at 401-03, 408-18.

Corporation *B* is a newcomer in the production of electronic data processing equipment. Because of limited resources, it can afford to compete only in the less expensive peripheral computer market. Consequently, it is forced to confine its production to peripheral computers, plug compatible with one of the few mainframe computer manufacturers' units. It chose to duplicate the plug unit of Corporation *A*. In no more than 3 years, Corporation *B* was manufacturing a peripheral computer superior to and less expensive than the product manufactured by Corporation *A*. It had picked up 20 percent of the market, decreasing Corporation *A*'s 45 percent share to 25 percent. Shortly thereafter, Corporation *A* announced that "due to technical innovations in our mainframe computer, we are forced to alter its plug unit design." This essentially would make Corporation *B*'s peripheral computers obsolete, thereby restoring Corporation *A*'s dominant share of the peripheral computer market. In order to save itself, Corporation *B* quickly alleges that the plug alteration scheme was an attempt to monopolize the peripheral computer market.[135] If the court employs the less restrictive burden, requiring only that the plaintiff prove specific intent, success is likely. However, if the court imposes the more onerous requirement of proof of specific intent and dangerous probability, the chances of plaintiff's success are substantially reduced. In the circuits employing the dangerous probability formulation, a potential reacquisition of 45 percent of the peripheral computer market is not a great enough command to warrant a finding of attempt to monopolize.[136] Thus, serious anticompetitive conduct is allowed to escape judicial sanction.

The shortcomings of the specific intent formula can be shown by slightly varying the facts as they appear above. Suppose Corporation *A* produced only mainframe computers. Its position being secure in that market, it then decides to expand into the peripheral computer market after being advised of the economic potential of such expansion. Assume further that prior to Corporation *A*'s entrance, the peripheral computer market was occupied by 10 manufacturers, each having almost exactly a 10 percent share of the market. Soon after its entrance, *A* gained an 11 percent share of the market which in 2 years more than doubled. This share was obtained solely by diligent competitive efforts and superior

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[135] The factual scheme in the hypothetical is largely derived from Telex Corp. v. International Business Machs. Corp., 367 F. Supp. 258 (N.D. Okla. 1973), 510 F.2d 894 (10th Cir.), *appeal dismissed*, 423 U.S. 802 (1975).

[136] *See, e.g.*, Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); Scranton Constr. Co. v. Litton Indus. Leas. Corp., 494 F.2d 778 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

business acumen. Upon losing its position in the peripheral computer market, Corporation *B* sought to slow down, if not totally eliminate Corporation *A* by alleging that Corporation *A* was attempting to monopolize the peripheral computer market in violation of section 2 of the Sherman Act. Proof was offered by Corporation *A*, however, tending to show that its success in the market was solely attributable to its superior business acumen. Further, Corporation *A* showed that the other corporations in the peripheral computer industry had grown content with their respective market positions, becoming relaxed in their efforts to produce a more technologically advanced peripheral computer at a lower cost. If the specific intent formula is the only burden imposed on the plaintiff, Corporation *A*'s legitimate competitive efforts would very probably be thwarted, since a rapidly increasing percentage of any line of commerce, regardless of there being no distinguishable market, usually has been held violative of the attempt offense by those courts requiring the plaintiff to show only specific intent. Moreover, such an adverse judgment would cause more suffering among consumers than by Corporation *A*. The peripheral computer manufacturers would most likely revert to their previous positions in the market, thereby offering the consumer a product less technologically advanced at a higher price. Thus, a vigorous competitive spirit in the industry would inevitably be devitalized.

Employment of the alternative approach would greatly decrease the possibility of allowing anticompetitive conduct to go unchecked. Instead of applying a rigid formula, the court would use a balancing approach in determining the defendant's guilt or innocence. It would necessarily require the plaintiff to reasonably define the relevant market and, further, show the defendant's percentage command of such market. Presentation of this proof, however, would follow the plaintiff's initial burden of proving that the defendant's conduct clearly indicated his intent to monopolize. The court would then employ the balancing approach in determining whether the defendant is guilty of attempted monopolization. As the defendant moves closer to monopoly power, his specific intent to monopolize (*e.g.*, predatory conduct) would be scrutinized less closely. Furthermore, even though the defendant's percentage command of the market is not significant, the defendant's conduct could still constitute a violation of the attempt offense. Such a finding would be justified if the defendant is shown to be rapidly progressing in capturing a significant share of a relevant market by the utilization of unfair, egregious conduct, although its present share is not great. Thus, even though a defendant is not dangerously close to monopoly power, its

anticompetitive conduct could nevertheless be "nipped in the bud."[137]

It is evident that uniformity is severely lacking in the judicial approaches to the attempt offense. Delineation of the plaintiff's burden in an attempt case has repeatedly been characterized by ambiguity. As a result, the intended effect of section 2's attempt prohibition has been largely negated. This misfortune is easily analogized to "Alice's world," in which serious controversy arose over the definition of a word.

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[138]

The attempt offense will continue to lack an individual, uniform character if it is not understood and interpreted as a *separate* prohibition of the Sherman Act. In this respect, the alternative approach, borrowing economically realistic notions from the two extreme approaches, greatly strengthens the attempt charge. It effectively molds it into a viable tool for antitrust enforcement without stifling vigorous competition. Although a legislative reformulation of the plaintiff's burden in an attempt case should be made, it is necessary for the judiciary to act until such legislative guidance is provided. It is submitted that the alternative approach is the most workable formula available to the judiciary.

H. Dixon Montague

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[137] United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945) ("If they are initial moves in a plan or scheme which, carried out, will result in a monopoly, they are dangerous and the law will nip them in the bud.").

[138] L. CARROLL, THROUGH THE LOOKING-GLASS 94 (1946).

THE THIRD PARTY ACTION—EXPANDING THE CIRCLE OF IMMUNITY: COEMPLOYEES

It is elemental that workmen's compensation constitutes an employee's sole remedy against his immediate employer for injuries arising out of and in the course of employment. Compensation statutes, however, generally preserve any cause of action which the injured employee might have against certain persons other than his employer. This Comment explores the status of certain parties who, though not "employers," have some connection with the activity of the employing enterprise.

As a preface, section I outlines the history and purpose of workmen's compensation and provides a brief sketch of the current Mississippi Compensation Act. Section II attempts to determine whether immunity should be accorded fellow workers whose negligence proximately causes an employee's injury. This issue, as yet unresolved by the Mississippi Supreme Court, has been the subject of increasing judicial and legislative scrutiny. After examining conflicting case law and legislative provisions, the author suggests a solution which, it is submitted, best comports with the policies underlying the compensation act.

I. Theory and Application of the Compensation Scheme

A. Theory

1. Enterprise Liability

With the advance of the industrial revolution, it became increasingly obvious that the common law system of compensating employment injuries was incompatible with the conditions of modern industrial life.[1] The industrial revolution not only occasioned a new mode of life for society but also greatly increased the hazards of employment.[2] By accepting employment, the worker increased both the risk of injury to himself and the risk that he would negligently cause injury to others.[3] Consequently, regardless of the presence of individual fault, employment injuries could be characterized accurately as resulting from the

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[1] *See* New York Cent. R.R. v. White, 243 U.S. 188 (1917); 1 A. Larson, The Law of Workmen's Compensation §§ 4.30, 4.40, 5.20 (1975) [hereinafter cited as Larson].

[2] *See* 1 Larson § 5.20, at 37; W. Malone, M. Plant & J. Little, The Employment Relation 46 (1974) [hereinafter cited as Malone, Plant & Little]:

> By the turn of the century it was apparent that the toll of industrial accidents . . . had become enormous, and government was faced with the problem of who was to pay for the human wreckage wrought by the dangers of modern industry.

[3] *See, e.g.*, Groves v. Marvel, 213 A.2d 853, 855 (Del. 1965); Feitig v. Chalkley, 185 Va. 966, 38 S.E.2d 73, 74 (1946).

risks of modern employment.[4] The common law, however, did not recognize the fact of employment as a causative agent. Instead, it demanded, as a condition precedent to recovery, that an injury be traced to the fault of some individual. Moreover, the cost of employment injuries inevitably fell upon the injured employee.[5] Although the employee's injury could often be traced to the negligence of either the employer or a fellow servant, three common law defenses—assumption of risk, contributory negligence, and the fellow-servant rule—combined to effectively preclude recovery against the employer.[6] Of course, the questionable solvency of a coemployee rendered the possibility of recovery against such a defendant remote at best.

Legislative cognizance of the foregoing resulted in the enactment of the various workmen's compensation statutes. In making the "employer" liable for compensation benefits irrespective of fault,[7] these statutes evidence the fundamental principle of compensation law—enterprise liability. Recognizing that industrial accidents are both predictable and causally related to the fact of employment, this principle places employment injury costs on the most logical risk-bearer—the employing enterprise. Like other costs of doing business, these costs may then be distributed to the consuming public[8] or absorbed by the employing enterprise.

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[4] In New York Cent. R.R. v. White, 243 U.S. 188, 205 (1917), the Court, denying a due process challenge to an early compensation act, stated:

> The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote, — the primary cause, as it may be deemed, — and that is, the employment itself.

See McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers,* 37 TEXAS L. REV. 389, 396-97 & nn. 23-27 (1959).

[5] An estimated 83% of employee injury cases were lost or otherwise uncompensated at common law. 1 LARSON § 4.30, at 27 (using German statistics for year 1907).

[6] *Id.* For an excellent discussion of the common law defenses, see New York Cent. R.R. v. White, 243 U.S. 188 (1917); 1 LARSON §§ 4.30, 4.40; MALONE, PLANT & LITTLE at 2-10.

[7] *See, e.g.*, MISS. CODE ANN. § 71-3-7 (1972).

[8] Workmen's Compensation rests upon the economic principle that those persons who enjoy the product of a business—whether it be in the form of goods or services—should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation, and distribution of the product.

MALONE, PLANT & LITTLE at 47; *see* Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 863 (1970)("The cost of the product should bear the blood of the workman."); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6, 10 (1952)(The purpose of compensation is to shift the cost of employment injuries "to the industry or business . . . and ultimately to the consuming public."); Davis, *Workmen's Compensation—Using An Enterprise Theory of Employment to Determine Who Is a Third Party Tort-Feasor,* 32 U. PITT. L. REV. 289, 291-93 (1971).

2. The Quid Pro Quo

A secondary principle of workmen's compensation emerges from the reciprocal exchange of rights. Workmen's compensation represents a compromise in which both employer and employee surrender certain common law rights in order to gain others not available at common law. Though subjected to liability for compensation benefits irrespective of fault, the employer is expressly immunized from common law liability.[9] Concomitantly, the employee surrenders his common law right to recover to the full extent of injury since the specified compensation benefits generally are much lower than the compensatory damages otherwise recoverable at common law.[10]

B. The Mississippi Compensation Scheme

The Mississippi Workmen's Compensation Act[11] requires every employer[12] regularly employing five or more workmen "in the same business or in or about the same establishment" to secure the payment of compensation benefits for his employees.[13] The term "regular," as employed by the Act, does not require that the employer constantly or

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[9] MISS. CODE ANN. § 71-3-9 (1972).

[10] *See, e.g.*, MISS. CODE ANN. §§ 71-3-13(2), -17, -21, -25 (1972), *as amended*, Act of May 21, 1976, H.B. 531, §§ 1-4, 1976 Reg. Sess., Miss. Legis. No. 7-15 to 20; FLA. STAT. ANN. §§ 440.12 to .15 (1966), *as amended*, (Supp. 1976-77); LA. REV. STAT. ANN. §§ 23:1202, -1221 (1964), *as amended*, (Supp. 1976). *See generally* The Report of the National Comm'n on State Workmen's Compensation Laws 53-74 (1972).

[11] MISS. CODE ANN. §§ 71-3-1 *et seq.* (1972), *as amended*, (Supp. 1975).

[12] "Employer" . . . includes a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, or corporation.

Id. § 71-3-3(e) (1972).

[13] *Id.* § 71-3-5 (Supp. 1975). Certain organizations, however, such as "nonprofit charitable, fraternal, cultural, or religious corporations or associations" and employers of domestic servants and farm workers are not subject to the Act. *Id.*

Under the casual employment doctrine, employees who are neither (1) employed in the employer's regular trade or business, nor (2) hired for an extensive or definite period of time are not considered "employees" within the meaning of the compensation statutes. *E.g.*, Sandburn v. Hall, 121 Ind. App. 428, 96 N.E.2d 912 (1951). Although Mississippi has not yet taken a position on the casual employment doctrine, the language of section 71-3-5 indicates that, should the opportunity arise, the supreme court would probably adhere to the doctrine as a matter of statutory construction. This supposition is reinforced by Jackson v. Fly, 215 Miss. 303, 60 So. 2d 782 (1952). In *Jackson*, the court stated:

> The word, "regularly" [as used in section 71-3-5] is not synonymous with constantly or continuously. The work may be intermittent and yet regular . . . .
>
> The word "regular" is used in the act as an antonym of the word "casual," and, when an employee is regular, or "regularly employed," he is not casual.

Id. at 308, 60 So. 2d at 785, *quoting with approval* Fowler v. Baalmann, Inc., 361 Mo. 204, 234 S.W.2d 11, 14 (1950).

continuously employ the requisite number of workmen. Indeed, the employer is subject to the Act if he "has once regularly employed enough men to come under the act . . . even though the number employed temporarily falls below the minimum."[14]

An employer subject to the Act is obligated to pay specified benefits to any employee[15] suffering an accidental[16] injury "arising out of and in the course of the employment."[17] Although various theories concerning the meaning of the phrase "arising out of and in the course of" have been advanced, the test for compensability of any employee injury is essentially one of causal connection. If the employment causes or contributes to the employee's injury, compensation will be awarded regardless of whether the injury occurred within the time and space limitations of the employment.[18] Thus, the Mississippi Act clearly reflects the principle of

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[14] Jackson v. Fly, 215 Miss. 303, 307-08, 60 So. 2d 782, 785 (1952), *quoting* 1 LARSON § 52.20, at 769; *accord*, Mosley v. Jones, 224 Miss. 725, 733, 80 So. 2d 819, 821 (1955).

[15] The term "employee" is defined as

> *any person*, including a minor whether lawfully or unlawfully employed, in the service of an employer *under any contract of hire, . . . written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors . . . .*

MISS. CODE ANN. § 71-3-3(d)(1972)(emphasis added). Thus, the right to compensation is made clearly contingent upon the establishment of the employment relation.

[16] MISS. CODE ANN. § 7-13-3(b)(1972) imposes the requirement of "accidentalness" by defining injury as "accidental injury or death."

Several jurisdictions have interpreted the term "accidental injury" by requiring that the injury must result from an "accident," *i.e.* an unexpected, untoward event which is identifiable as to time and place of occurrence. *See, e.g.*, Kelly-Springfield Tire Co. v. Daniels, 199 Md. 156, 85 A.2d 795 (1952); Caled Products Co., Inc. v. Sausser, 199 Md. 514, 86 A.2d 904 (1952); Tegels v. Western Chevrolet Co., 81 S.D.2d 592, 139 N.W.2d 281 (1966); Tines v. Brown Shoe Co., 290 S.W.2d 200 (Mo. App. 1956); Taggart v. Industrial Comm'n, 79 Utah 598, 12 P.2d 356 (1932). Under the view generally expressed by these cases, there can be no "accident" unless the *cause* of the employee's injury was unexpected. Thus, if an employee suffered a heart attack as a result of his performance of his usual work in the usual way, his claim for compensation would be denied even though the injury was caused by such work. *Cf.* Hillerich & Bradsby Co. v. Parker, 267 S.W.2d 746 (Ky. 1954).

Since such a rigid rule precluded compensation in cases where the injury was clearly work-related, the Mississippi Supreme Court early rejected it in favor of a much more liberal approach to "accidentalness." In Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952), the court held that where an unexpected breakdown of an internal organ occurs as a result of the employee's performance of his normal work there is an "accidental injury" within the meaning of the Act, even though there is no single external event to which the injury can be traced. So long as the injury is both unexpected and causally related to the claimant's employment the injury is deemed to be "accidental."

[17] MISS. CODE ANN. § 71-3-7 (1972).

[18] *See* Mississippi Res. & Dev. Center v. Shults, 287 So. 2d 273 (Miss. 1974).

Historically, the Mississippi Supreme Court has interpreted the "arising out of and in the course of" language as encompassing a bifurcated test. Under this more or less

enterprise liability: Injuries resulting from risks inherent in the employment enterprise are compensable.

The quid pro quo concept also finds expression in the Mississippi Act. If the employer has secured payment of compensation by providing insurance coverage for his employees or by qualifying as a self-insurer,[19] he is expressly immunized from common law liability for employment injuries.[20] When the employer is subject to the Act but fails to secure payment of compensation, however, the injured worker may bring a common law action without encountering the traditional defenses of assumption of risk, contributory negligence, and the fellow-servant rule.[21]

II. Coemployee Liability

At common law, servants owed to each other the duty of exercising

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traditional approach, an injury is said to "arise out of" the employment when a causal connection exists between the injury and the employment, *e.g.*, Earnest v. Interstate Life & Accident Ins. Co., 238 Miss. 648, 119 So. 2d 782 (1960); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So. 2d 281 (1951), but the further requirement that the injury be "in the course of" the employment is satisfied only when the injury occurs within the time and space limitations of the employment. Persons v. Stokes, 222 Miss. 479, 486, 76 So. 2d 517, 519 (1954). Thus, in *Persons*, the court stated:

> [A]n injury occurs "in the course of" the employment when it *takes place within the period of the employment at a place where the employee reasonably may be* in the performance of his duties . . . .

Id. at 485-86, 76 So. 2d at 519. The court, however, has seemingly abandoned this two-tiered approach in favor of a unitary test. *See* Mississippi Res. & Dev. Center v. Shults, 287 So. 2d 273 (Miss. 1974). In *Shults*, an employee suffering from a pre-existing heart disease, which was aggravated by his work, fell dead on the kitchen floor of his home after returning from his place of employment. Eschewing the argument that the worker's injury, to be compensable, must be manifested within the time and space limits of the employment, the court stated that the phrase "arising . . . in the course of employment"

> does not say that the injury must "occur" or "be manifested" or "be consummated" in the course of employment. It merely says that it must arise ". . . in the course of the employment." "Arising" connotes origin, not completion or manifestation.

Id. at 276, *quoting* 1 Larson § 29.22, at 5-208. The unitary test of causation expressed in *Shults* is reinforced by the Act's treatment of occupational diseases: "An occupational disease shall be deemed to arise out of and in the course of employment when there is evidence that there is a direct causal connection between the work performed and the occupational disease." Miss. Code Ann. § 71-3-7 (1972). If the test is one of causal connection in occupational disease cases, the same test should be applied in cases involving other types of injury.

[19] Miss. Code Ann. § 71-3-75 (1972).

[20] *Id.* § 71-3-9; Taylor v. Crosby Forest Prod. Co., 198 So. 2d 809 (Miss. 1967).

[21] Miss. Code Ann. § 71-13-9 (1972); McCoy v. Cornish, 220 Miss. 577, 71 So. 2d 304 (1954).

> ordinary care in the performance of their service and were liable for a failure in that respect which resulted in injury to a fellow servant.[22]

As originally enacted, most state compensation laws preserved, either expressly or through judicial interpretation, the employee's common law rights against his fellow worker.[23] Thus the two principles of workmen's compensation were brought into apparent conflict. On one hand, the principle of enterprise liability ostensibly dictated that coemployees be immunized since the risk of injury at the hands of a negligent coemployee is one traceable to the fact of employment. On the other hand, the quid pro quo principle seemingly espoused the view that the negligent coemployee should be amenable in tort since he is not liable for the payment of compensation and therefore should not be afforded gratuitous immunity for his misdeeds.

A majority of states now have resolved this dilemma by expressly immunizing not only the "employer" but also all "persons in the same employ."[24] Under these more recent provisions, the tortfeasor-employee

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[22] Frantz v. McBee Co., 77 So. 2d 796, 798 (Fla. 1955).

[23] *See* 2 LARSON §§ 72.00 to -.20 (1974).

[24] The following jurisdictions are those in which the immunity is now expressly extended to the coemployee: *Alabama:* ALA. CODE tit. 26, § 312 (Supp. 1973); *Alaska:* ALAS. STAT. § 23.30.015 (1975); *California:* CAL. LABOR CODE § 3601(a)(Supp. 1975); *Colorado:* COLO. REV. STAT. ANN. § 81-52-108 (1973); *Connecticut:* CONN. GEN. STAT. ANN. § 31-293(a)(1972); *Delaware:* DEL. CODE ANN. ch. 19, § 2363(a)(1974); *Georgia:* GA. CODE ANN. § 114-103 (Supp. 1975); *Hawaii:* HAWAII REV. STAT. § 386-8 (1968); *Illinois:* ILL. STAT. ANN. ch. 48, § 138.5(b)(Supp. 1975); *Indiana:* IND. STAT. ANN. § 22-3-2-13 (Supp. 1975); *Kansas:* KAN. STAT. ANN. § 44-504 (1963); *Michigan:* MICH. COMP. LAWS ANN. § 418.827 (1)(Supp. 1975); *Montana:* MONT. REV. CODES § 92-204.1 (1973); *Nevada:* NEV. REV. STAT. § 616.560 (1)(1975); *New Jersey:* N.J. STAT. ANN. § 34:15-8 (Supp. 1975); *New Mexico:* N.M. STAT. ANN. §§ 59-10-4, 59-10-5 (1974); *New York:* N.Y. WORKMEN'S COMP. § 29(1)(Supp. 1975); *North Carolina:* N.C. GEN. STAT. § 97.9 (1972), *codifying rule of* Warner v. Leder, 234 N.C. 727, 69 S.E.2d 46 (1952); *North Dakota:* N.D. CENT. CODE ANN. § 65-01-08 (1960); *Ohio:* OHIO REV. CODE ANN. § 4123.741 (1974), *codifying rule of* Landrum v. Middaugh, 117 Ohio St. 608, 160 N.E. 691 (1927); *Oklahoma:* OKLA. STAT. tit. 85, § 44 (a) (Supp. 1975); *Oregon:* ORE. REV. STAT. § 656.018 (1975); *Pennsylvania:* PA. STAT. ANN. tit. 77, § 72 (Supp. 1975); *South Carolina:* S.C. CODE ANN. § 72-401 (1962); *Texas:* TEX. CIV. STAT. ANN. art. 8306, § 3 (1967); *Utah:* UTAH CODE ANN. § 35-1-62 (Supp. 1975); *Virginia:* VA. CODE ANN. § 65.1-41 (1973); *Washington:* WASH. REV. CODE ANN. § 51.24.010 (Supp. 1974); *West Virginia:* W.VA. CODE ANN. § 23-2-6(a) (1973); *Wyoming:* WYO. STAT. ANN. § 27-312(a)(Supp. 1975).

It is interesting to note that several of the above statutes were apparently enacted as a direct response to judicial decisions refusing to grant the immunity to coemployees. *See, e.g.*, United States Fire Ins. Co. v. McCormick, 243 So. 2d 367 (Ala. 1970), *legislatively overruled by* ALA. CODE tit. 26, § 312 (Supp. 1973); Ranson v. Haner, 362 P.2d 282 (Alas. 1961), *legislatively overruled by* ALAS. STAT. § 23.30.015 (1975); Webster v. Stewart, 210 Mich. 13, 177 N.W. 230 (1920), *legislatively overruled by* MICH. COMP. LAWS ANN. § 418.827(1)(Supp. 1975). Several instances of legislative reaction have been remarkably swift. In Hinkleman v. Wheeling Steel Corp., 114 W.Va. 269, 171 S.E. 538 (1933), the court utilized an agency theory in holding that a coemployee acting within the course of his

is immunized from liability if both he and the injured employee were engaged in the course of their common employment at the time of the injury-producing act.[25]

Many jurisdictions, however, have retained the type of provision which expressly immunizes only the "employer" and permits the injured employee to sue any "third party" or "person other than the employer."[26] Typically, the pertinent Mississippi statutes provide that

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employment acts as the agent of the employer and therefore shares the employer's immunity. This rule endured without legislative interference until it was expressly overruled by the West Virginia Supreme Court in Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (1947). In *Tawney*, the court stated that, in the absence of "express statutory language" to the contrary, a coemployee whose negligence caused the injury would be liable in tort even though the injury was compensable under workmen's compensation. At its very next session, the West Virginia Legislature amended the compensation act to immunize coemployees. Bennet v. Buckner, 150 W.Va. 648, 149 S.E.2d 201, 204-05 (1966); *see* Markle v. Williamson, 518 P.2d 621 (Wyo. 1974), *legislatively overruled by* WYO. STAT. ANN. § 27-312(a)(Supp. 1975).

In Arizona, the legislative attempts to broaden the employer's immunity have been held unconstitutional by the state's highest court. *See* ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1975), the predecessor of which was invalidated by Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972)(state constitutional provision prohibiting abrogation of common law right of action against tortfeasor coemployee).

[25] *See, e.g.*, Chenelik v. Vana, 31 Ill. 2d 272, 201 N.E.2d 434 (1964); Wallace v. Wathen, 476 S.W.2d 829 (Ky. 1972); Jackson v. Hutchison, 453 S.W.2d 269 (Ky. 1970); Konitch v. Hartung, 81 N.J. Super. 376, 195 A.2d 649 (1963); Moakler v. Blanco, 47 App. Div. 2d 614, 364 N.Y.S.2d 526 (N.Y. Sup. Ct., App. Div. 1975).

[26] The following jurisdictions so provide: *Arkansas:* ARK. STAT. ANN. § 81-1340(a)(1)(1960), *construed in* King v. Cardin, 319 S.W.2d 214 (Ark. 1959)(coemployee amenable in tort); *Florida:* FLA. STAT. ANN. § 440.39(1) (1966), *construed in* Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955)(coemployee amenable in tort); *Idaho:* IDAHO CODE §§ 72-211, -223(1)(1973), *construed in* White v. Ponozzo, 77 Idaho 276, 291 P.2d 842 (1955)(coemployee shares employer's immunity); *Iowa:* IOWA CODE ANN. § 85.22(3)(Supp. 1974), *construed in* Craven v. Oggero, 213 N.W.2d 678 (Iowa 1974)(coemployee amenable in tort); *Kentucky:* KY. REV. STAT. §§ 342.690, 342.700 (Baldwin's 1973 Replacement), *construed in* Miller v. Scott, 339 S.W.2d 941 (Ky. 1960)(coemployee shares employer's immunity); *Louisiana:* LA. REV. STAT. ANN. § 23.1101 (1964), *construed in* Adams v. Fidelity & Cas. Co., 107 So. 2d 496 (La. App. 1958)(coemployee amenable in tort); *Maine:* ME. REV. STAT. ANN. tit. 39, § 68 (1964); *Maryland:* MD. ANN. CODE, art. 101, § 58 (Supp. 1975), *construed in* Thomas v. Hycon, Inc., 244 F. Supp. 151 (D.D.C. 1965)(coemployee amenable in tort); *Massachusetts:* MASS. GEN. LAWS ANN. ch. 152, § 15 (Supp. 1975), *construed in* Caira v. Caira, 296 Mass. 448, 6 N.E.2d 431 (1937)(coemployee shares employer's immunity); *Minnesota:* MINN. STAT. ANN. § 176.061(1)(1966), *construed in* Behr v. Soth, 170 Minn. 278, 212 N.W. 461 (1927)(coemployee amenable in tort); *Mississippi:* MISS. CODE ANN. §§ 71-3-9, -71 (1972); *Missouri:* MO. ANN. STAT. § 287.150 (1965), *construed in* Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.2d 497 (1931)(coemployee amenable in tort); *Nebraska:* NEB. REV. STAT. § 48-118 (1968), *construed in* Rehn v. Bingaman, 151 Neb. 196, 36 N.W.2d 856 (1949)(coemployee amenable in tort); *New Hampshire:* N.H. REV. STAT. ANN. § 281.14 (1966), *construed in* Merchants Mut. Cas. Co. v. Tuttle, 98 N.H. 349, 101 A.2d 262 (1953)(coemployee amenable in tort); *Rhode Island:*

> [t]he liability of an *employer* to pay compensation shall be exclusive and in place of all other liability of such employer to the employee [or anyone else who might] otherwise [be] entitled to recover damages at common law . . . from such employer on account of such injury or death . . . .[27]
>
> . . . .
>
> The acceptance of compensation benefits from . . . an employer or insured for the injury or death of an employee shall not affect the right of the employee or his dependents to sue *any other party* at law for such injury or death . . . .[28]

Most courts faced with the task of construing this type of statute have ruled that an employee is a "third party" amenable in tort when he negligently injures a coemployee.[29] Others, however, have reached a contrary conclusion.[30]

Although no Mississippi case has expressly decided the issue, the Mississippi Supreme Court, in *Mosley v. Jones*,[31] seems to have assumed that a coemployee is a third party within the meaning of our statute. Earl Mosley and H.M. Bowers had contracted to build a home for McDaniel. Jones, employed by Chaney, a subcontractor on this job, was injured when he fell from a scaffold while plastering a room in the house. Alleging that R.L. Coleman, who was employed by Mosley and Bowers, had negligently constructed the scaffold, Jones brought a common law action against Mosley, Bowers, and Coleman for injuries sustained as a result of his fall.

The court found that since Chaney regularly employed eight[32] workmen in his subcontracting business but had not secured payment of

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R.I. GEN. LAWS ANN. § 64-4-38 (1969); *South Dakota:* S.D. COMP. LAWS ANN. § 62-4-38 (1967), *construed in* Wilson v. Hasvold, 86 S.D. 86, 194 N.W.2d 251 (1972) (coemployee amenable in tort); *Tennessee:* TENN. CODE ANN. § 50-914 (1966), *construed in* Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 328 (1954)(coemployee shares employer's immunity); *Vermont:* VT. STAT. ANN. tit. 21, § 624 (1967), *construed in* Steele v. Eaton, 130 Vt. 1, 285 A.2d 749 (1971)(coemployee amenable in tort, but duty alleged to have been breached must have been personally owed to the individual injured employee); *Wisconsin:* WIS. STAT. ANN. § 102.29 (1973), *construed in* Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975) (coemployee amenable in tort, but only for affirmative acts of negligence).

[27] MISS. CODE ANN. § 71-3-9 (1972)(emphasis added).

[28] *Id.* § 71-3-71 (emphasis added).

[29] *See* note 26 *supra*.

[30] *Id.*

[31] 224 Miss. 725, 80 So. 2d 819 (1955).

[32] The provision in force at the time of the *Mosley* decision required all employers employing eight or more workmen to secure the payment of compensation. At present, employers with five or more regular operatives are subject to the Act. *Compare* MISS. CODE ANN. § 71-3-5 (1972) *with id.* (Supp. 1975).

compensation for his employees, the principal contractors—Mosley and Bowers—were statutorily obligated[33] to pay compensation benefits to Jones for his injuries. The court further reasoned that since Mosley and Bowers were liable for the payment of compensation, they were immune from common law liability as Jones' "statutory employer."[34]

Addressing the issue of Coleman's tort liability, the court found that he owed no duty to Jones upon which liability could be predicated. Having determined Coleman's liability on this basis of negligence law, the *Mosley* opinion can be read as implicitly holding coemployees amenable in tort. This reading is reinforced by the fact that Mosley and Bowers enjoyed immunity from the tort action only because they were liable for the payment of compensation benefits. Coemployees have no such liability; thus, the statutory language, coupled with the *Mosley* holding, seems to infer that coemployees are third parties amenable in tort. But since *Mosley* did not expressly decide the issue, the question of coemployee liability remains open in this state. The author will therefore examine the conflicting case law from other states and attempt to determine which result—amenability or immunity—best comports with the underlying policies of workmen's compensation.

A. The Coemployee Decisions

1. Immunity Granted

Despite the relatively[35] clear meaning of the terms "employer" and

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[33] MISS. CODE ANN. § 71-3-7 (1972) provides in part:

> Every employer to whom this chapter applies shall be liable for and shall secure the payment . . . of compensation payable under its provisions.
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> In the case of an employer who is a subcontractor, the contractor shall be liable for and secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment.

[34] Since the general contractor is thereby, in effect, made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation; and the great majority of cases have so held.

224 Miss. at 732, 80 So. 2d at 821, *quoting* 2 LARSON § 72.31. at 175 (1952).

[35] One might contend that the legislature would have expressly abrogated the fellow servant's common law liability if that result had been intended to flow from the compensation act. *See, e.g.*, Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955). This argument is buttressed by the ancient rule that the legislature will not be deemed to have acted in derogation of the common law in the absence of express statutory language to the contrary. *See, e.g.*, Marquez v. Rapid Harvest Co., 1 Ariz. App. 562, 405 P.2d 814, 817 (1965); City of Jackson v. Wallace, 189 Miss. 252, 196 So. 223 (1940); Interstate Life & Accident Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1934); Hemingway v. Scales, 42 Miss. 1 (1868). Thus, it is maintained that the terms "employer" and "some person other than the employer" should be literally interpreted. Hence, immunity runs only to the "employer,"

"third party," several jurisdictions have interpreted statutes similar to Mississippi's as immunizing coemployees.[36] In these jurisdictions, the decisions are generally premised on one of two theories: (1) a merger theory, utilizing common law principles of agency; or (2) the principle of enterprise liability.[37]

a. The Merger Doctrine

In *White v. Ponozzo*,[38] the Supreme Court of Idaho construed an immunity provision which expressly immunized only the "employer." In holding that the negligent coemployee shared this immunity, the court reasoned that an employee acting within the *scope* of his employment acts as the agent of the employer. While acting in such capacity, he is to be equated with the "employer" for the purposes of tort liability under the compensation act.[39] Since the employer would not have been subject to common law liability, neither was the coemployee.[40]

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and the fellow servant is amenable in tort. *See, e.g.*, King v. Cardin, 229 Ark. 929, 319 S.W.2d 214 (1959); Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955); 2A LARSON § 72.10, at 14.33.

On the other hand, it may be contended that if the legislature had so intended, it could have specifically provided that the payment of compensation to an injured employee should not bar the injured party's common law action against his fellow servant whose negligence caused the injury. This argument is reinforced by several factors. First, the compensation scheme is such a wide departure from the common law that it is possible that the term "employer" was not meant to be technically construed. This is especially true when one considers the fact that many statutes, including the Mississippi provision, define the term "employer" inclusively rather than exclusively. *See, e.g.*, MISS. CODE ANN. § 71-3-3 (e)(1972). Second, it is a basic principle of statutory construction that legislation must be construed so as to effectuate the purposes and principles which underlie the statutory provisions. Thus, in interpreting a statute which allowed the injured employee to sue "some persons or corporations other than his employer," the Supreme Court of Montana stated:

> The language of the Montana Act does not specify whether coemployees are included or excluded from immunity from negligence actions by the injured employee. To determine the intent of the legislature in this regard, we must look to the purposes of the Act and its provisions for the accomplishment of such purposes.

Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 863 (1970). Thus, the question of immunity ultimately rests upon the courts' varying interpretations regarding the policies of compensation law. *Compare id. with* Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955).

[36] *E.g.*, White v. Ponozzo, 77 Idaho 276, 291 P.2d 843 (1955); Miller v. Scott, 339 S.W.2d 941 (Ky. 1960); Caira v. Caira, 296 Mass. 448, 6 N.E.2d 431 (1937); Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 328 (1954).

[37] *See, e.g.*, Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 161 N.E.2d 812 (1959); Caira v. Caira, 296 Mass. 448, 6 N.E.2d 431 (1937); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934); Madison v. Pierce, 156 Mont. 209, 478 P.2d 860 (1970).

[38] 77 Idaho 276, 291 P.2d 843 (1955).

[39] 291 P.2d at 845.

[40] The defendant, . . . being a co-employee of the plaintiff, is also exempt

Although this agency rationale may seem facially appealing, it is subject to criticism because it bears no relation to the purposes of workmen's compensation. The agency rules relating to "scope of employment" were developed "for the purpose of determining a master's liability for the act of his servants,"[11] not for any compensation purpose. It is suggested that blind importation of these rules into the compensation field is inappropriate because the principles underlying vicarious liability differ from those underlying compensation law.

b. The Enterprise Liability Theory

Of the decisions finding coemployees immunized by third party statutes, those founded upon the enterprise liability theory best comport with the principles of workmen's compensation.

For example, in *Madison v. Pierce*,[12] an employee brought a common law action against three officers and a foreman of her corporate employer. At the time of the suit, the state compensation act provided that compensation benefits were the exclusive remedy "as between employer and employee," but permitted actions at law against "persons or corporations other than the employer."[13] Noting that the term "coemployee" encompasses managerial and executive employees as well as workmen and laborers, and that the state immunity provision did not expressly include coemployees,[14] the court considered the purposes underlying the compensation act to determine whether coemployees were amenable to suit. The court stated:

> The broad purpose of the . . . Workmen's Compensation Act is to substitute a system for the payment of medical costs and wage losses to injured employees without regard to fault, for the common law system of legal action by the injured employee against the one whose

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[*sic*] from liability by the Workmen's Compensation Law. As an employee acting within the scope of his employment, he was the agent of the employer. His acts and conduct became the acts and conduct of the employer, and the exemption from damages at law extended to the employer by the Workmen's Compensation Law is also by that act extended to co-employees through whom the employer acts. Thus, the co-employee becomes merged in the employer and is not a third person, within the meaning of the compensation law, against whom a damage action may be maintained.

Id., *citing, e.g.*, Gifford v. Nottingham, 68 Idaho 330, 193 P.2d 831 (1948); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934); Landrum v. Middaugh, 117 Ohio St. 608, 160 N.E. 691 (1927); Caira v. Caira, 296 Mass. 488, 6 N.E. 2d 431 (1937).

[11] Loper v. Yazoo & M.V.R.R., 166 Miss. 79, 85, 145 So. 743, 745 (1933).

[12] 156 Mont. 209, 478 P.2d 860 (1970).

[13] 478 P.2d at 862.

[14] *Id.* at 863.

> negligence proximately caused the injury. The principle behind this legislation was that the business enterprise or industry should directly bear the costs of injury to its employees in the same manner as the enterprise has always borne the costs of maintaining and repairing its plant, machinery and equipment. The business enterprise should pass along the costs of maintenance and repair of its human resources, its employees, in the same manner as is done in the case of other production costs, namely in the price at which its product is sold to the public. This underlying purpose finds summary expression in the familiar phrase "the cost of the product should bear the blood of the workmen."[45]

Rejecting plaintiff's argument that a liberal construction of the act demands that negligent coemployees be amenable in tort since the specified compensation benefits did not fully compensate for his injury,[46] the court based its decision upon the principle of enterprise liability. Noting that an employer is subrogated to any recovery against a third party,[47] the court reasoned that to hold the coemployee amenable to suit would shift the cost of employment injuries from the employing enterprise, "where the Act places it," to the employees of the enterprise, "where the Act does not place it."[48] Therefore, the court concluded that the coemployee is not "some person other than the employer" but rather is merged with the employer and shares his immunity.[49]

One disturbing factor, treated somewhat lightly by the *Madison* court, is that immunity from tort liability traditionally has been viewed as premised upon the existence of a liability for the payment of compensation.[50] Since there is no "contract of hire" between coemployees, there is no liability for the payment of compensation.[51] Consequently, there

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 863-64; *accord,* MISS. CODE ANN. § 71-3-71 (1972), which provides in pertinent part:

> [T]he employer or his insurer shall be entitled to reasonable notice and opportunity to join in any [third party action] . . . . If such employer or insurer join [*sic*] in such action, they shall be entitled to repayment of the amount paid by them as compensation and medical expenses from the net proceeds of such action . . . .

[48] 478 P.2d at 864.

[49] *Id.* at 865.

[50] *See, e.g.*, Ransom v. Haner, 362 P.2d 282 (Alas. 1961); Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955); *cf.* Mosley v. Jones, 224 Miss. 725, 80 So. 2d 819 (1955). The reason for the employer's immunity is the quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common law verdicts. 2A LARSON § 72.20, at 14-39.

[51] *See, e.g.*, Ransom v. Haner, 362 P.2d 282, 287 (Alas. 1961); Stulginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10, 13 (1939); Frantz v. McBee Co., 77 So. 2d 796, 800 (Fla. 1955); Price v. King, 259 Iowa 921, 146 N.W.2d 328, 330 (1966).

Under MISS. CODE ANN. § 71-3-7 (1972), liability for the payment of compensation

seems to be little basis for granting immunity.[52] Under the quid pro quo theory, it is maintained that compensation is a reciprocal exchange of rights and since the coemployee surrenders nothing vis-à-vis his fellow workers, he should not be entitled to the immunity of the act.[53] The decisions denying coemployee immunity are primarily based upon this theory.

2. Coemployee Amenable in Tort

Decisions holding the negligent coemployee amenable in tort are premised upon several interrelated factors: (1) the language of the third-party statute;[54] (2) the rule of statutory construction that common law rights will not be deemed abrogated absent express statutory language to the contrary;[55] and, perhaps most importantly, (3) the proposition that immunity is dependent upon a liability for compensation.[56]

In *Frantz v. McBee Co.*,[57] the Florida Supreme Court confronted the coemployee immunity question as one of first impression. George Frantz had been fatally injured as a result of the alleged negligence of Robert Finley. In the wrongful death action brought against him, Finley argued that since both he and the decedent had been engaged in the course of their common employment at the time of the injury, he could not be considered a "third party" within the meaning of the Florida statute. Finding no statutory language "expressly or by necessary inference" requiring the abrogation of the "common law rule respecting the liability of a negligent coemployee," the court stated that it could not "read

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exists with respect only to one's employees. As defined by the Act, an employee is "any person . . . in the service of an employer under any contract of hire . . . ." *Id.* § 71-3-3(d). Thus, the "contractual theory," under which immunity is denied the coemployee, could be found applicable in Mississippi.

[52] *See, e.g.*, Ransom v. Haner, 362 P.2d 282 (Alas. 1961); Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850, 853 (1961), *legislatively overruled by* N.M. STAT. ANN. §§ 59-10-4, -5 (1974); Frantz v. McBee Co., 77 So. 2d 796, 799 (Fla. 1955); Stulginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10 (1939); Price v. King, 259 Iowa 921, 146 N.W.2d 328 (1966). *But see* notes 69 through 75 and accompanying text *infra*.

[53] See cases cited notes 51 & 52 *supra*.

[54] *E.g.*, Marquez v. Rapid Harvest Co., 1 Ariz. App. 562, 405 P.2d 814 (1965); King v. Cardin, 229 Ark. 929, 319 S.W.2d 214 (1959); Frantz v. McBee Co., 77 So. 2d (Fla. 1955); Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634 (1947). See 2A LARSON § 72.10, at 14-33.

[55] *E.g.*, Marquez v. Rapid Harvest Co., 1 Ariz. App. 562, 405 P.2d 814 (1965); King v. Cardin, 229 Ark. 929, 319 S.W.2d 214 (1959); Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955); *see* 2A LARSON § 72.10, at 14-33.

[56] *See, e.g.*, Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955); Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.2d 497 (1931); Tawney v.Kirkhart, 130 W. Va. 550, 44 S.E.2d 634 (1947); McGonigle v. Gryphan, 201 Wis. 269, 229 N.W. 81 (1930).

[57] 77 So. 2d 796 (Fla. 1955).

into the statute a provision which" was not there.[58] The court, in holding the negligent coemployee subject to liability, stated:

> "It is the *liability* to secure compensation which gives the employer immunity from suit . . . . His immunity from suit is commensurate with his liability for securing compensation—no more and no less." There is, of course, no liability on the part of an employee to secure compensation for a coemployee. And since there is no liability under the Act, there is no immunity . . . .[59]

The major difficulty with this logic lies in its apparent emasculation of the principle of enterprise liability.[60] In Mississippi, for example, the employer liable for the payment of compensation is subrogated to the rights of the injured employee to the full extent of his compensation liability.[61] Thus, if the injured employee receives $5,000 in compensation but later recovers a $5,000 judgment against a negligent coemployee, the employing enterprise shoulders none of the employment injury cost. To this extent, the decisions finding the coemployee amenable in tort circumvent the principle of enterprise liability. Yet, to the extent that the employing enterprise at least guarantees the payment of a minimum sum to the injured employee, the principle of enterprise liability is not defeated. Indeed, it may be argued that this is all compensation laws were ever intended to do. It also may be contended that by placing the loss on the tortfeasor coemployee, the courts uphold the principles of tort law without doing violence to those of compensation law.[62]

The force of the quid pro quo argument, however, is somewhat diminished by three factors. This argument apparently originated not

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[58] *Id.* at 799.

[59] *Id.*, *quoting* Jones v. Florida Power Corp., 72 So. 2d 285, 287 (Fla. 1955).

Somewhat gratuitously, the court added: "To hold that a coemployee is not liable for his own negligence would increase the hazard of employments . . . ." 72 So. 2d at 800, *quoting* Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634, 641 (1947); *accord,* Price v. King, 259 Iowa 921, 146 N.W.2d 328, 330 (1966). However, until there is some "demonstrable evidence" that the third party action against negligent coemployees deters negligence in the performance of employment duties, this argument must "repose in the realm of fantasy." Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 866 (1970).

[60] *See* notes 1 through 8 and accompanying text *supra.*

[61] MISS. CODE ANN § 71-3-71 (1972) provides:

> [A]ny amount recovered by the injured employee or his dependents (or legal representative) from a third party shall be applied as follows: reasonable costs of collection as approved and allowed by the court . . . shall be deducted; the remainder, or so much thereof as is necessary, shall be used to discharge the legal liability of the employer or insurer; and any excess shall belong to the injured employee or his dependents.

[62] *See generally* Comment, *Workmen's Compensation—Executive Officer Liability,* 33 LA. L. REV. 325 (1973); Comment, *Workmen's Compensation: Third Party Actions in South Dakota,* 18 S.D.L. REV. 423 (1973).

as a fundamental precept of compensation law but rather as justification for upholding the constitutionality of early acts against employers' due process challenges.[63] In this context, the imposition of liability without regard to fault was deemed fair since, in exchange for his old common law rights, the employer received limited liability.[64] This reciprocal exchange of rights, which serves as the theoretical basis for decisions such as *Frantz v. McBee Co.*,[65] thus arose from the schematics of the statutes. Moreover, in giving birth to this theory, the United States Supreme Court recognized that the "*principle* underlying Workmen's Compensation is the same in all states."[66] As previously noted, that principle is enterprise liability: "[S]ince accidents are a natural, and in part inevitable, concomitant of industry . . . *society,* which is served thereby, should" absorb the losses generated by these industrial accidents.[67] This principle can be effectuated only by imposing liability on the employing enterprise, for it alone is able to distribute the costs to society.[68]

Second, even if deemed a "principle" of workmen's compensation, the quid pro quo theory itself does not necessarily mandate the imposition of tort liability on the negligent coemployee if the injury to his fellow worker is compensable. By accepting employment, a worker increases not one, but two risks: (1) the risk that he will be injured as a result of employment-related hazards; and (2) the risk that he will negligently cause injury to his fellow worker.[69] These risks are inherent in the employment. Given that compensation represents a compromise of rights based upon the practicalities of modern employment,[70] should not this compromise reflect the practicalities of risks inherent to employment? The coemployee's rights are involved in the compromise, and one thing which he could legitimately expect to receive is freedom from ruinous negligence actions.[71] The verity of this proposition is demonstrated by the following hypothetical: An employer negligently provides

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[63] *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188 (1917); New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917).

[64] *See* New York Cent. R.R. v. White, 243 U.S. 188 (1917).

[65] 77 So. 2d 796 (Fla. 1955), discussed at text accompanying notes 56 through 58 *supra*.

[66] New York Cent. R.R. v. Winfield, 244 U.S. 147, 166 (1917).

[67] *Id.* at 165. In Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73, 74 (1946), the court stated that injury from a fellow servant's acts is "an inherent risk of the business and should be shouldered by the business itself."

[68] *See* cases cited note 63 *supra*.

[69] *E.g.*, Groves v. Marvel, 213 A.2d 853, 855 (Del. 1965); Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73, 74 (1946).

[70] *See* notes 1 through 10 and accompanying text *supra*.

[71] 2A LARSON § 72.20, at 14-39.

employee *A* with an unreasonably dangerous machine, and *A* negligently operates it, causing injury to both himself and coemployee *B*. At common law, *B* could sue both the employer and *A*, contending that they were *both* responsible for his injury. Assuming that *A* could succeed in such an action, the loss would be shared by the joint tortfeasors, *A* and the employer.[72] But under the compensation act, *B* cannot sue his employer. Thus, the loss, if coemployee amenability is the applicable rule, will fall squarely and totally on *A* since, in Mississippi, there is no right of contribution among joint tortfeasors unless a single judgment is rendered against them.[73] Of course *B* could choose to sue only *A*. In that instance, *A* would have neither the right to join the employer as a co-defendant nor the right to contribution against him should *B* prove successful in the action.[74] Thus it could be maintained that *A*'s rights are not affected by the workmen's compensation compromise on the ground that it affects only *B*'s right to choose his defendants. Yet to the extent that granting the employer immunity precludes the possibility of *B*'s choice, and thus ensures that the entire loss will fall on the negligent coemployee, *A*'s rights are affected. Moreover, the rule of coemployee immunity can be justified on a quid pro quo basis. In the preceding hypothetical, if *A* is given immunity, what has he given up in return? A simplistic but eminently reasonable answer is that *A* has given up the right to sue *B* should the situation be reversed. Thus, *A*'s rights are involved in the compromise of workmen's compensation and the quid pro quo principle itself can justify granting him immunity.

Third, "if tort law is viewed as a means not merely of giving compensation to the injured party but providing an appropriate means of distributing the risk of loss,"[75] imposition of liability on the negligent coemployee may often defeat the latter purpose. If the tortfeasor is a man of simple means, without insurance, damage awards "may prove

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[72] MISS. CODE ANN. § 85-5-5 (1972) provides in part:

In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tort feasors, the defendants against whom such a judgment is rendered shall share equally the obligation imposed by such judgment, and if one (1) of such defendants pays an amount greater than the total sum of the judgment divided by the number of defendants against whom the judgment was rendered, then the other defendants shall be jointly and severally liable to him for the amount so paid in excess of his proportionate part; provided that no defendant shall be liable to any other defendant for more than his proportionate share of the original judgment.

[73] *Id.*

[74] Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Junkins v. Brown, 238 Miss. 142, 117 So. 2d 712 (1960); Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So. 2d 216 (1941); MISS. CODE ANN. § 85-5-5 (1972).

[75] McCoid, *supra* note 4, at 446.

as debilitating to his economic welfare as the original loss did to the injured worker's, with the result that society as a whole has not been benefited by the shift of loss."[76] Moreover, since many industrial injuries result from "accident proneness or inadvertence over which the individual employee has little or no conscious control,"[77] the fault element may be nonexistent.

Apart from these considerations, holding the coemployee amenable in tort may indirectly circumvent the immunity expressly granted the employer when the tort suit is against an executive officer of a corporate employer.

B. The Executive Officer Problem

In most instances of injury by a nonsupervisory coemployee, a tort action would be futile. As one author has noted, the common laborer is "unlikely to have resources beyond his own labor."[78] Consequently, a great number of the coemployee decisions have involved suits against managerial or supervisory personnel.[79]

1. Circumvention of the Employer's Immunity

As previously noted, all jurisdictions immunize the "employer" from common law liability with respect to compensable injuries.[80] The continued availability of a third party action against coemployees has, however, frequently resulted in an indirect imposition of common law liability on the employer.[81] In order to protect themselves against ruin-

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 466.

[79] *See, e.g.*, United States Fire Ins. Co. v. McCormick, 243 So. 2d 367 (Ala. 1970)(president, vice-president, and foreman); Ransom v. Haner, 362 P.2d 282 (Alas. 1961)(general superintendent, assistant superintendent, and foreman); Cravens v. Kurtz, 210 Cal. App. 2d 80, 26 Cal. Rptr. 802 (Cal. Ct. App. 1962) (superintendent); Jackson v. Georgia-Pacific, Inc., 195 Cal. App. 2d 412, 15 Cal. Rptr. 680 (Cal. Ct. App. 1961)(plant superintendent and foreman); Evans Chemical Works v. Ball, 159 Ky. 399, 167 S.W. 390 (1914)(job foreman); Adams v. Fidelity & Cas. Co., 107 So. 2d 496 (La. Ct. App. 1958)(officers and stockholder-directors); Kaumans v. White Star Gas & Oil Co., 92 Utah 24, 63 P.2d 231 (1936)(managing officer).

[80] See notes 24 & 26 and accompanying text *supra*.

[81] Miller v. Muscarelle, 34 N.J. 574, 170 A.2d 437, 445-46 (1961); *see, e.g.*, United States Fire Ins. Co. v. McCormick, 243 So. 2d 367 (Ala. 1970).

> It has been suggested that, as a result of executive officer liability, the policy of the Workmen's Compensation Act has been undermined. It is indeed difficult to deny that when the third party executive is found liable by the court, the injured employee receives both the benefit of the Workmen's Compensation Act and a recovery in damages that the act forbids him to exact from his "employer."

ous third party judgments, supervisory employees have had to either secure personal liability insurance coverage or obtain such protection from the employer.[82] When the latter course is followed, the employer's express immunity is arguably rendered nil, since the common law judgment falls upon the employer via the cost of providing insurance. Of course, the employer is in no way obligated to provide executive officer liability coverage. By refusing to do so, the employer could preserve its immunity. But the fact remains that employers do provide such coverage,[83] and to the extent they continue to do so, any judgment rendered against a covered coemployee operates to circumvent the employer's immunity from common law damages. Although the corporate entity itself remains immune, little comfort can be derived from that fact[84] when a third party judgment is rendered against a supervisory employee covered by the corporation's liability insurance policy.[85]

In this context, it must be noted that the Supreme Court of Mississippi recognizes the "universal principle" that "no party may accomplish by indirection that which he is not permitted to do directly."[86] Thus, it could be argued that coemployees entitled to defense and coverage under the employer's liability insurance policy should always be immune from liability. To accomplish this result, the immunity must

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Comment, *Workmen's Compensation—Executive Officer Liability, supra* note 62, at 325-26 (citations omitted).

[82] Comment, *Workmen's Compensation—Executive Officer Liability, supra* note 62, at 333; *see* Miller v. Muscarelle, 34 N.J. 574, 170 A.2d 437, 445-46 (1961).

[83] *See, e.g.*, United States Fire Ins. Co. v. McCormick, 243 So. 2d 367 (Ala. 1970); Gulf Am. Fire & Cas. Co. v. Singleton, 265 So. 2d 720 (Fla. Ct. App. 1972); Le June v. Liberty Mutual Ins. Co., 261 So. 2d 280 (La. Ct. App. 1972); Maxey v. Aetna Cas. & Surety Co., 255 So. 2d 120 (La. Ct. App. 1971); Berry v. Aetna Cas. & Surety Co., 240 So. 2d 243 (La. Ct. App. 1970); Bordelon v. Great Am. Indemnity Co., 124 So. 2d 634 (La. Ct. App. 1960).

> The continued subsistence of a cause of action against a fellow employee has come under considerable public criticism in recent years. It has frequently resulted in burdening the employer indirectly with common-law damages superimposed upon his workmen's compensation liability by reason of either a legal, moral or practical obligation to indemnify the sued director, officer of supervisory employee, or with the expense of carrying insurance to cover the personal liability of such supervisory personnel.

Miller v. Muscarelle, 34 N.J. 574, 170 A.2d 437, 445-46 (1961).

[84] At least one commentator has argued that the circumvention of the employer's immunity is not so real as imaginative: "While the corporate employer may have undertaken the costs of liability insurance for some of its employees, the corporation itself remains immune from tort liability." Comment, *Workmen's Compensation: Third Party Actions in South Dakota, supra* note 62, at 431 n. 54 (1973).

[85] *Compare id. with* Comment, *Workmen's Compensation—Executive Officer Liability, supra* note 62, at 333.

[86] City of Ellisville v. State Hwy. Comm'n, 186 Miss. 473, 489, 191 So. 274, 277 (1939).

be extended—judicially or legislatively—carte blanche. Any rule premised upon a finding of coverage and resultant circumvention would prove totally ludicrous; for if immunity were granted only when the recovery would stem from the employer's liability insurance, the amenability of a coemployee defendant could not be decided until after a trial on the merits determining the scope of such policy's coverage.

Recognizing that suits against supervisory personnel render the employer's immunity less meaningful,[87] the courts have tinkered furiously with the duty rules to avoid circumventing the proscriptions of the immunity provisions.

2. Adjusting the Duty Rules

At common law, an employer is legally obligated to provide his employees with a reasonably safe work environment.[88] When the employer is a corporate entity, however, it is incapable of acting toward its employees except through its officers and agents. Therefore, the duty to provide a safe place to work is delegated down the chain of corporate command from the board of directors to executive officers and other supervisory personnel.[89] As to whether a breach of this delegated duty gives rise to personal liability, there is a divergence of opinion.

In *Craven v. Oggero*,[90] the plaintiff's decedent had suffered a fatal fall from an unsafe bridging device which connected a vertical hoist to a building being constructed by the decedent's corporate employer. Alleging that both the company safety director and job superintendent had negligently failed to ensure the safety of the bridging device,[91] plain-

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[87] Miller v. Muscarelle, 34 N.J. 574, 170 A.2d 437, 445-46 (1961)(dissenting opinion); Comment, *Workmen's Compensation—Executive Officer Liability*, *supra* note 62, at 325-26.

[88] *See, e.g.*, Harris v. Patent Scaffolding Co., 277 So. 2d 483 (La. Ct. App. 1973); Johnson v. Schneider, 271 So. 2d 579 (La. Ct. App. 1972); Chaney v. Brupbacher, 242 So. 2d 627 (La. Ct. App. 1970); Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974); Wilkie v. West Coast Constr. Co., 196 Miss. 233, 16 So. 2d 154, *suggestion of error overruled*, 196 Miss. 233, 16 So. 2d 617 (1944); Benton v. Finkbine Lumber Co., 118 Miss. 558, 79 So. 326 (1918); Mississippi Cent. R.R. v. Hardy, 88 Miss. 732, 41 So. 505 (1906); Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975); Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W. 2d 64 (1973); Walsey v. Kosmatka, 50 Wis. 2d 738, 184 N.W.2d 821 (1971).

[89] *E.g.*, Johnson v. Schneider, 271 So. 2d 579 (La. Ct. App. 1973); *see* cases cited note 73 *supra*.

Notably, several jurisdictions hold that the duty to provide a reasonably safe place to work is nondelegable. *E.g.*, Benton v. Finkbine Lumber Co., 118 Miss. 588, 79 So. 346 (1918); Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975). See text accompanying notes 95 through 102 *infra*, for a discussion of the nondelegability rule's impact in the context of coemployee liability.

[90] 213 N.W.2d 678 (Iowa 1973).

[91] *Id.* at 683.

tiff brought an action against these two supervisory coemployees. Although both defendants had the "authority and duty to eliminate unsafe conditions,"[92] they contended that since these duties had been delegated to them in their representative capacities, such duties were owed only to the corporate employer and that they owed no personal duty to the decedent.[93] Rejecting this contention, the court stated:

> Where one employee has been assigned a duty to act for the safety of other employees, he has a *personal* duty to such other employees to so act. The fact that he holds a supervisory position does not exculpate him from liability. Nor does the fact that the duty is assigned in implementation of the employers' duty to provide all employees a [reasonably] safe place to work.[94]

A diametrically opposed view was espoused by the Supreme Court of Wisconsin in *Kruse v. Schieve*.[95] In that case, a machinery operator who had been injured while cleaning a certain machine brought a tort action against her corporate employer's vice president. The complaint alleged, *inter alia,* that the defendant had been negligent in "failing to instruct the plaintiff" as to the proper manner of operating and cleaning the machine and in "allowing the machine to become . . . in need of repair."[96] Plaintiff further contended that "[s]ince a corporate officer can be sued in his capacity as a coemployee, there is no logical reason why he should be exempt from personal liability" when he negligently fails to discharge duties assigned to him by the corporate employer.[97] The court, however, disagreed. The court reasoned that since the employer's duty to provide employees with a reasonably safe place to work is nondelegable, such duty "is owed by a corporate officer or supervisory employee to the employer, not to a fellow employee."[98] Consequently, the defendant could not be held liable for failing to instruct the plaintiff as to the proper manner of operating and cleaning the machinery.[99] Subsequent cases clarified *Kruse's* nondelegable duty rule to require, as a condition precedent to supervisor liability, that the supervisory employee must have committed some "affirmative act of negligence . . . which increased the risk of injury" to the particular employee.[100]

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[92] *Id.* at 681.

[93] *Id.* at 682.

[94] *Id.*; *accord,* United States Fire Ins. Co. v. McCormick, 243 So. 2d 367 (Ala. 1970); Ransom v. Haner, 362 P.2d 282 (Alas. 1961); Johnson v. Schneider, 271 So. 2d 579 (1st Cir. La. Ct. App. 1972).

[95] 61 Wis. 2d 421, 213 N.W.2d 64 (1973).

[96] 213 N.W.2d at 65.

[97] *Id.* at 66.

[98] *Id.* at 67.

[99] *Id.* at 68-69.

[100] Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432, 434 (1975), *quoting*

Notably, in several non-compensation decisions, Mississippi has taken the position that the employer's duty to provide a reasonably safe place to work is nondelegable.[101] Consequently, it can be argued that the *Kruse* reasoning should be applied in Mississippi. Although the nondelegable duty rule has its origin in the common law context of the employer's liability to its servants, and thus should not be *blindly* applied, it does serve as an avenue for at least partial avoidance of executive officer liability. To the extent that the question is one of duty, this common law rule does have applicaton. Thus, if the court concludes that the purposes of compensation are best served by immunizing supervisory personnel from liability for negligent performance of employer-delegated duties, the nondelegable duty rule provides an excellent avenue for achieving that result. It does, however, ignore several policy questions which arise when the duty breached is not an employer-delegated one. First, does the principle of enterprise liability demand immunization of the coemployee regardless of the nature of the duty breached? Second, does the quid pro quo theory necessarily conflict with such immunization? Indeed, should not all coemployees be immunized when acting within the scope of their employment?

A third approach to the delegated duty problem, arguably supported by the Restatement of Agency,[102] is exemplified by the decisions of the Supreme Court of Louisiana.[103] These decisions establish the rule that when a corporate officer or other supervisory employee responsible for effectuating the employer's duty to provide a reasonably safe place to work has delegated that duty to other competent supervisory personnel, he normally will not be held personally liable for breach of that duty.[104] Of course, if the delegating officer knew or reasonably should have known that the supervisor to whom the performance duty had been delegated was not fulfilling his obligation, he will be held liable.[105] Although the Louisiana approach allows upper echelon personnel to avoid imposition of vicarious liability by delegating responsibility down

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Ortman v. Jenson & Johnson, Inc., 66 Wis. 2d 508, 225 N.W.2d 635, 639 (1975).

[101] Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974); Wilkie v. West Coast Constr. Co., 196 Miss. 233, 16 So. 2d 154, *suggestion of error overruled,* 196 Miss. 233, 16 So. 2d 617 (1944); Benton v. Finkbine Lumber Co., 118 Miss. 558, 79 So. 326 (1918); Mississippi Cent. R.R. v. Hardey, 88 Miss. 732, 41 So. 505 (1906).

[102] *See* RESTATEMENT (SECOND) OF AGENCY § 354; Comment, *Workmen's Compensation—Executive Officer Liability, supra* note 62, at 331.

[103] *E.g.*, Canter v. Koehring Co., 283 So. 2d 716 (La. 1973); Harris v. Patent Scaffolding Co., 277 So. 2d 483 (La. Ct. App. 1973); Johnson v. Schneider, 271 So. 2d 579 (La. Ct. App. 1972); Chaney v. Brupbacher, 242 So. 2d 627 (La. Ct. App. 1970); Adams v. Fidelity & Cas. Co., 107 So. 2d 496 (La. Ct. App. 1958).

[104] See cases cited note 103 *supra.*

[105] *E.g.*, Johnson v. Schneider, 271 So. 2d 579 (La. Ct. App. 1972).

the chain of command, someone must inevitably exist at the bottom of that chain. Thus this approach, unlike the nondelegable duty rule, does not completely avoid the imposition of vicarious liability on supervisory personnel. This discrepancy could seemingly be justified by the fact that the supervisor occupying the bottom rung is normally closest to the activity causing the injury. Unlike upper echelon personnel, he will likely have direct knowledge of the safety conditions prevailing in the area under his charge. Absent other considerations, this approach to the duty problem seems most justifiable.[106] Other considerations, however, do exist since the Louisiana approach, like the nondelegable duty rule, ignores crucial policy questions.

III. Conclusion

Despite the relatively clear import of the terms "employer" and "third party," the question of coemployee liability is not easily resolved. On the technical side, if the statute is literally interpreted it becomes difficult to envision a result other than coemployee amenability.[107] This technical point is, however, diminished by two factors. First, since the compensation act effects a wide departure from common law it is entirely possible that it was not meant to be technically construed. Second, the Mississippi statute defines "employer" inclusively rather than exclusively.[108] Thus, nothing prohibits the court from reading that term to include coemployees acting within the course of the employment. Moreover, statutes should not be construed without considering the principles underlying the provisions.

The basic premise of workmen's compensation is enterprise liability. This principle dictates that employee losses occasioned by injury or death arising out of and in the course of the employment be placed upon the employing enterprise which may then distribute these losses among the ultimate consumers of the product or service.[109] Decisions holding coemployees amenable in tort, however, place the loss solely upon an individual rather than the employing enterprise. If this individual is a common laborer, he is unlikely to have insurance, and the damage award "may prove as debilitating to his economic welfare as the original loss did to the injured worker's . . . ."[110] In this event, the rule of coemployee amenability effectuates the purposes of neither compensation nor

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[106] *See* Comment, *Workmen's Compensation—Executive Officer Liability*, *supra* note 62.

[107] See note 35 *supra*.

[108] Miss. Code Ann. § 71-3-3(e) (1972).

[109] See notes 7 & 8 and accompanying text *supra*.

[110] McCoid, *supra* note 4, at 466. See text accompanying notes 75 through 78 *supra*.

tort law.[111] If the individual defendant is a supervisory employee, he may well be able to bear the loss or distribute it through personal liability insurance. Yet, supervisory employees are not infrequently covered by the employer's executive liability insurance policy. If the loss falls upon the employer's insurance carrier, the express immunity provision is arguably rendered less meaningful.[112]

Additionally, decisions finding coemployees amenable in tort ignore the fact that the risk of injuring a coemployee arises from the fact of employment in the same manner, and to the same extent, as the risk of injury itself.[113] This risk, being inherent in the employment, should be borne by the employing enterprise.

Most importantly, decisions adhering to the coemployee amenability view, although based upon the quid pro quo theory,[114] fail to recognize that this theory is not necessarily opposed to coemployee immunity. Given that the employer's immunity may be premised upon the liability for the payment of compensation benefits,[115] it is nevertheless true that the coemployee's rights are affected by the compromise of rights effected by the compensation act,[116] and he may well be entitled to immunity should he negligently injure another employee. The quid pro quo for such immunity, although simplistic, is nonetheless real: If the situation were reversed, immunity would also be granted.[117]

For these reasons, it is submitted that the rule of coemployee immunity best comports with the policies of Mississippi's Workmen's Compensation Act.

Herbert C. Ehrhardt

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[111] See text accompanying notes 75 through 78 *supra*.
[112] See notes 80 through 85 and accompanying text *supra*.
[113] See notes 3 & 69 and accompanying text *supra*.
[114] See notes 54 through 59 and accompanying text *supra*.
[115] See note 59 *supra*.
[116] See notes 71 through 75 and accompanying text *supra*.
[117] *Id*.

POWER OF THE STATE OIL AND GAS BOARD TO AMEND OR MODIFY FINAL ORDERS CREATING PARTICIPATION RIGHTS IN MINERAL OWNERS

Because oil and gas are depletable natural resources, conservation of those resources recently has been thrust to the forefront of public interest.[1] As a result of this interest, oil-producing states have enacted conservation laws regulating the exploration for and production of oil and gas.[2] In accord with other producing states, Mississippi has enacted conservation laws regulating drilling and production which embrace a policy of encouraging development, preventing waste, and ensuring an equitable division of the proceeds among the separate owners in a common source of supply.[3]

While the legislature can enact laws which generally cover the problems of conservation, it obviously cannot administer those laws in detail or oversee their enforcement.[4] Thus, the administration and enforcement of the conservation laws has been delegated to the Mississippi State Oil and Gas Board.[5] The Board's primary purpose—promoting the policies of the conservation laws—is accomplished through the regulation of all exploration and production within the state.[6] The Board issues statewide rules[7] as well as specific orders directed to each particular field.[8] These orders become final when entered by the Board after notice

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[1] R. MYERS, THE LAW OF POOLING AND UNITIZATION: VOLUNTARY—COMPULSORY 3 (1967); *see* Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946).

> The public interest is based on the fact that these minerals are irreplaceable; that they are of immense benefit to individuals and industry, and constitute in many states an important source of revenue.

R. MYERS, *supra*, at 3-4.

[2] R. MYERS, *supra* note 1, at 4. The Supreme Court has found the authority of the states to pass such legislation within their police power. Hastings v. Selby Oil & Gas Co., 319 U.S. 348, 349 (1943); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 579-80 (1940); Ohio Oil Co. v. Indiana, 177 U.S. 190, 210-12 (1900).

[3] MISS. CODE ANN. §§ 53-1-1 *et seq.* (1972), *as amended,* (Supp. 1976). For a declaration of policy factors relating to Mississippi's conservation laws, see *id.* § 53-1-1. *See also* R. MYERS, *supra* note 1, at 3-20 (general discussion of conservation laws).

[4] Consequently, a person or agency is designated as the agent of the state to administer and enforce the conservation laws. In order to enforce the laws, these persons or agencies are given extensive powers which have been upheld as a valid delegation of legislative authority. California Co. v. State Oil & Gas Board, 200 Miss. 824, 840, 27 So. 2d 542, 545 (1946). *See generally* Norvell, *The Railroad Commission of Texas: Its Origin and Relation to the Oil and Gas Industry,* 40 TEXAS L. REV. 231 (1961).

[5] MISS. CODE ANN. § 53-1-5 (1972).

[6] *Id.* §§ 53-1-1, -5, -17; *see* Watters, *Judicial Review of the Mississippi State Oil & Gas Board,* 36 MISS. L.J. 324 (1965) (discussion of the general scope and powers of the Mississippi State Oil and Gas Board).

[7] MISS. CODE ANN. § 53-1-17(c)(1), (2), (5) (1972).

[8] *Id.* § 53-1-17(c) (10), (11).

and hearing.[9] The standard required for amending or modifying these final orders is unclear vis-à-vis orders which actually determine the competing rights of the various owners in a common source of supply.[10] This Comment examines the powers of the Board and the standard which must be satisfied in order to amend or modify final orders which create in the mineral owner a right of participation in a common source of supply. In particular, the modification power of the Board is examined with the goal of solving the problem of double royalty.[11]

I. The Double Royalty Problem—The *James* Case

The double royalty problem is illustrated by *Shell Oil Co. v. James*[12] and its forerunner, *Phillips Petroleum Co. v. Millette.*[13] As a result of these two decisions, in certain circumstances a lessee must pay a double royalty on part of the oil he produces from a given unit.

In *James,* two 80-acre drilling units had been established in the southwest quarter section, structured so that the quarter section was divided into an east unit and a west unit.[14] James, a lessor, owned the entire acreage in the east unit (on which there was no producing well) and the south 40 acres of the productive west unit.[15] The producing well, located in the north half of the west unit, was found to be draining the north half of the east unit. It was determined that a fault bisected the units along their east-west centerline in such a manner that all production emanated from the north half of the quarter section.[16] Although James received royalty on half of the west unit production as a result of acreage participation, his unit acreage south of the fault line contributed no production.[17]

James sued lessee Shell for royalties on the oil drained from the productive oil sand beneath the east unit.[18] Based upon the lease contract to pay royalty, the court required Shell to compensate James for

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[9] *Id.* § 53-1-21.

[10] *Compare* Superior Oil Co. v. State Oil & Gas Bd., 220 So. 2d 602 (Miss. 1969), *with* Shell Oil Co. v. James, 257 So. 2d 488 (Miss. 1972), *and* Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960).

[11] The modification problem affects many areas other than the double royalty situation—for example, the need for modification in light of excessive waste. *See* Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1958).

[12] 257 So. 2d 488 (Miss. 1972).

[13] 221 Miss. 1, 72 So. 2d 176 (1954).

[14] 257 So. 2d at 490.

[15] *Id.* at 490-91.

[16] *Id.*

[17] *Id.* at 491.

[18] *Id.* at 493.

the drainage.[19] The court found that in the context of a lessee common to the producing unit and the drained tract, the prudent operator standard should not apply.[20] Instead, the lease contract to pay royalty required that, in the case of substantial drainage, the owner of the drained tract must be compensated even though a well on his tract would not be profitable.[21]

The *James* decision is the end result of *Phillips Petroleum Co. v. Millette,*[22] which the court cited as controlling authority in *James.*[23] In *Millette,* Phillips was the operating lessee of an oil-producing unit.[24] An adjacent tract, owned by Millette and also under lease to Phillips, was underlain by some of the producing sands.[25] Millette sued Phillips to recover royalties for drainage, but the evidence indicated that there were insufficient productive sands underlying the Millette property to justify a well.[26] Nevertheless, the court held that the "substantial drainage" required Phillips to compensate the adjoining landowner.[27] The court inferred that the lease contract required compensation for drainage even though a double royalty might result in some instances.[28]

The rationale of *James* and *Millette* produces a rule unique to Mississippi: Where a producing well is draining an adjoining tract, the landowner must be compensated if the drainage is substantial and is attributable to a common lessee *even though* a well on the adjoining tract would be unprofitable.[29] Although a double royalty is paid on oil produced from the unit and determined to be drainage, this rule is perhaps more equitable to the landowner than the rule in other jurisdictions which compensates the landowner only if the prudent operator standard would require a well to be located on his land.[30]

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[19] *Id.* at 495-96.

[20] *Id.* at 495. An implied covenant to prevent drainage required the lessee to compensate his lessor for drainage if a prudent operator would drill an offset well. 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 821 (1975). The prudent operator is a reasonable man engaged in oil and gas operations. He is a hypothetical oil operator who does what he should do and does not do what he should not do with respect to operations on the leasehold. *Id.* § 806.3, at 41.

[21] 257 So. 2d at 495-96.

[22] 221 Miss. 1, 72 So. 2d 176 (1954).

[23] 257 So. 2d at 495-96.

[24] 221 Miss. at 14-17, 72 So. 2d at 178-79.

[25] *Id.* at 13-14, 72 So. 2d at 177-78.

[26] *Id.* at 14-15, 72 So. 2d at 178.

[27] *Id.* at 22-26, 72 So. 2d at 182-83.

[28] *See id.*

[29] *Compare* Shell Oil Co. v. James, 257 So. 2d 488 (Miss. 1972), *with* Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954).

[30] *See* Pray, *The Oklahoma Well Spacing Act and Its Interpretation,* 36 OKLA. B.J. 487, 497-502 (1965).

The *James* decision, however, is the extreme of the double royalty situation recognized by the *Millette* court and emphasizes the unfairness of this rule. James received royalty on half of the west unit production as a result of unit participation by his unproductive acreage. In addition, he received royalty on the oil drained from the adjacent tract for which the lessee had to pay a double royalty.[31]

It is suggested that a reformation of the producing unit to encompass the productive acreage would be a more equitable solution than double royalty. Following a reformation approach, the landowner would be justly compensated without exacting a double royalty from the lessee.[32] *James* represents an excellent example: Shell, after discovering the fault, could petition the State Oil and Gas Board to reform these units into a north 80-acre unit and a south 80-acre unit. Consequently, all production would be contributed by the north unit. The lessor would receive his fair share of production, and the lessee would not be required to pay a double royalty.

This proposed modification would effectively decrease James' share of the production proceeds. This result is, however, more desirable than nonproductive acreage sharing in production with a resultant double royalty simply because strata information was scant at the time the units were established.[33] This is especially true where, as in *James,* subsequent information obtained by drilling yields the true picture.

Unit modification might also be employed to avoid the double royalty in a *Milette*-type situation. After determining that although there was insufficient oil under the adjacent tract to justify an additional well, substantial drainage was occurring, the lessee could petition the Board to reform the unit to encompass the slight additional acreage. Through such a reformation, the landowner would be compensated by acreage participation. The prudent operator standard would, of course, continue to determine the duty of offset.[34]

There is some question regarding the standard required and the Board's power to reform an established unit where, as a result of the reformation, the owners' interests are different from those in the original unit. In response to this question, this Comment will examine the nature

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[31] 257 So. 2d at 495-96.

[32] Reformation would necessitate a readjustment of rights in the proceeds; however, the power of regulatory commissions to achieve this result is doubtful in some states. *See* Pray, *supra* note 30, at 498-99.

[33] A question exists regarding the power of the Board to amend or reform a unit because of inaccurate strata information. Such power seems justified, however, in a double royalty situation. See section IV *B. infra.*

[34] See note 20 *supra.*

[35] See section II *infra.*

of Board orders,[35] the law of other jurisdictions,[36] and the law of Mississippi concerning the amendableness of Board orders.[37]

II. Classification of Board Orders

The term "conservation order" describes all orders of the State Oil and Gas Board which promulgate the policy of the conservation laws. State conservation statutes generally grant the regulatory agency the authority to modify or amend these orders.[38] A difference of opinion exists, however, with respect to when such a modification of a conservation order is appropriate.[39] In order to determine the power of the Board to amend, it is necessary to ascertain the extent to which res judicata applies to administrative proceedings. This determination in turn requires a classification of administrative proceedings.

A. Administrative Action: The Judicial-Legislative Dichotomy

As a "creature of the legislature," the authority of an administrative agency such as the State Oil and Gas Board is derived from a legislative delegation of power.[40] For this reason, some states completely reject the applicability of res judicata to administrative proceedings.[41] However, other jurisdictions, including Mississippi, recognize the judicial-legislative dichotomy of such proceedings[42] and apply res judi-

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[36] See section III *infra.*

[37] See section IV *infra.*

[38] *E.g.*, Miss. Code Ann. § 53-1-17 (Supp. 1976); Okla. Stat. Ann. tit. 52, § 112 (West 1969); Pa. Stat. Ann. tit. 58, § 407 (Purdon 1964).

[39] *Compare* Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960), *with* Wood Oil Co. v. Corporation Comm'n, 205 Okla. 534, 239 P.2d 1021 (1950), *and* City of Fond Du Lac v. Department of Natural Resources, 45 Wis. 2d 620, 173 N.W.2d 605 (1970). *See generally* 2 K. Davis, Administrative Law Treatise §§ 18.01 *et seq.* (1958); Williams, *Nature and Effect of Conservation Orders: Their Finality, Modification, Restriction on Production and Consequences of Violation—Duty of Lessees,* 8 Rocky Mt. Min. L. Inst. 433, 443-48 (1963). See section III *infra.*

[40] California Co. v. State Oil & Gas Bd., 200 Miss. 824, 840, 27 So. 2d 542, 545 (1946); Watters, *supra* note 6, at 324-25.

[41] See notes 72 through 80 and accompanying text *infra.*

[42] *E.g.*, United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966); City of Jackson v. Holliday, 246 Miss. 412, 419-20, 149 So. 2d 525, 527 (1963); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 840, 27 So. 2d 542, 545 (1946); Dixie Greyhound Lines, Inc. v. Mississippi Pub. Serv. Comm'n, 190 Miss. 704, 713, 200 So. 579, 579-80 (1941) (dictum); *see* 2 K. Davis, *supra* note 39, § 18.08, at 597-98; *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 866 (1952). Although difficulties with the legislative-adjudicatory dichotomy in the application of res judicata principles do exist, the basic distinction can be retained for descriptive purposes. *See* 2 K. Davis, *supra* note 39, § 18.08, at 597-98.

cata principles to those of a judicial or quasi-judicial character.[43]

The current trend is to apply the doctrine to some administrative determinations.[44] This inclination is especially evident where the determinations are made for purposes similar to those of a court and in proceedings similar to judicial proceedings.[45] Professor Davis has stated:

> As a matter of principle, it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to some administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for some administrative determinations. The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor.[46]

Administrative proceedings which establish rules and regulations without affected parties present best exemplify "legislative" proceedings to which res judicata is inapplicable.[47] This type of proceeding merely establishes proscriptive rules rather than adjudicating rights between parties.[48] At the other end of the spectrum are proceedings clearly adjudicatory in character. In such proceedings, rights between parties are adjudicated upon findings of past fact and the parties have an opportunity to be heard.[49] In many proceedings, however, the

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[43] *E.g.*, United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); City of Jackson v. Holliday, 246 Miss. 412, 419, 149 So. 2d 525, 527 (1963); Watkins v. Mississippi State Bd. of Pharmacy, 170 Miss. 26, 32, 154 So. 277, 278 (1934); 2 K. Davis, *supra* note 39, § 18.02, at 548; *Developments in the Law—Res Judicata, supra* note 42, at 866-67. See section III *B. infra*.

[44] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966); Yavapai Co. v. Wilkinson, 111 Ariz. 530, 534 P.2d 735, 737 (1975); City of Jackson v. Holliday, 246 Miss. 412, 419, 149 So. 2d 525, 527 (1963); Bockman v. Arkansas State Medical Bd., 229 Ark. 143, 313 S.W. 2d 826, 829 (1958); *see Developments in the Law—Res Judicata, supra* note 42, at 867-68.

[45] *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); Chicago Grain Trimmers Ass'n v. Enos, 369 F.2d 344, 349 (7th Cir. 1966), *rev'd on other grounds sub nom.*, Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968); Cardinal Bus Lines v. Consoldiated Coach Corp., 254 Ky. 586, 72 S.W.2d 7, 10 (1934) (commissioner licensing common carrier to operate on public highways); Evans v. Monaghan, 306 N.Y. 312, 118 N.E.2d 452, 457 (1954) (disciplinary proceedings against police officer).

[46] K. Davis, *supra* note 39, § 18.02, at 548 (footnote omitted).

[47] *See id.* § 18.08, at 597 & n.1; Harris, *Modification of Corporation Commission Orders Pertaining to a Common Source of Supply*, 11 Okla. L. Rev. 125, 132 (1958); *Developments in the Law—Res Judicata, supra* note 42, at 866-67.

[48] *See* 2 K. Davis, *supra* note 39, § 18.08, at 597 & n.1; *Developments in the Law—Res Judicata, supra* note 42, at 866-67.

[49] 2 K. Davis, *supra* note 39, § 18.03, at 559; *Developments in the Law—Res Judicata,*

judicial-legislative division is not clearly discernible.[50]

B. Conservation Orders

Conservation orders of the State Oil and Gas Board arguably are more adaptable to the legislative-adjudicatory categorization than are some other agency proceedings. Conservation orders pertaining to a common source of supply can be classified into two types: (1) orders establishing field rules and regulations, and (2) orders determining the participation rights of mineral owners within a common source.[51]

1. Regulatory Orders

As its name implies, the regulatory order is merely regulatory in nature and has been aptly characterized by one author as an "order of restraint."[52] While establishing proscriptive rules and regulations over the mineral owners' property use, a regulatory order does not adjudicate substituted property rights. Typical of such orders are field rules such as those regulating gas-oil ratios,[53] specifications for well completion,[54] and regulation of stimulation procedures.[55] Since a regulatory order is merely restrictive in effect, and since "no substantive rights have vested permanently by reason of its existence,"[56] res judicata should be inapplicable, and the power of the Board to amend or modify such orders should be unlimited.[57] Modification of a regulatory order can thus be premised simply upon proof that a change would comport with conservation policies.[58]

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supra note 42, at 867; Note, *The Applicability of Res Judicata and Collateral Estoppel to Actions Brought under Section 8(b)(4) of the National Labor Relations Act*, 67 MICH. L. REV. 824, 830 (1969).

[50] *Developments in the Law—Res Judicata*, *supra* note 42, at 867; *see* 2 K. DAVIS, *supra* note 39, § 18.03, at 559-60.

[51] Harris, *supra* note 47, at 132; *see* Superior Oil Co. v. Beery, 216 Miss. 715, 719, 64 So. 2d 357, 360 (1953) (dictum); MISS. CODE ANN. § 53-1-17(c) (Supp. 1976) (illustrates different types of orders).

[52] Harris, *supra* note 47, at 132.

[53] *See* MISS. CODE ANN. § 53-1-17(c)(5) (Supp. 1976).

[54] *See id.* § 53-1-17(c)(1).

[55] *See id.* § 53-1-17(c)(9); Harris, *supra* note 47, at 132, 146-47 (discussion of orders relating to stimulation procedures).

[56] Harris, *supra* note 47, at 132.

[57] *Id.* at 132; *see, e.g.*, Superior Oil Co. v. State Oil & Gas Bd., 220 So. 2d 602 (Miss. 1969) (allowed field rules to be amended to designate two separate pools).

[58] The conservation policies of the Mississippi Oil & Gas Board are set forth in MISS. CODE ANN. § 53-1-1 (1972).

2. Orders Vesting Participation Rights

A conservation order which vests in the mineral owner a right of participation in production from a particular pool can be distinguished from a regulatory order. The former "actually adjudicates and determines the competing rights of different owners in a common source of supply."[59] Further, such orders adjudicate competing rights of the mineral owners by actually substituting a right of participation in the common source for common law property rights.[60] Orders of this type are those determining spacing and establishing drilling units, as well as those establishing field-wide units.

Conservation orders which vest a right of participation are best described by example. The Board, in *Frost v. Gulf Oil Corp.*,[62] established pooled units for production of a gas pool after notice and hearing.[63] Because the source of supply lay beneath a pool already in production, the Board merely designated certain units established for the upper pool as units for the lower pool.[64] The lessors within one unit appealed the order on several grounds.[65] In upholding the Board's order, the court recognized that the Board had given notice and held a hearing at which it "adjudicated all things necessary for the establishment of said units."[66] Establishment of each pooled unit substituted the right to participation in the gas produced from that unit for some of the property rights of the respective mineral owners within the unit. For example, the mineral leases on lands within the unit were continued beyond the primary term by production from the unit.[67] Additionally, the owners of separate tracts within the unit could no longer drill on these tracts,[68] and each separate owner's share of production from the pool was determined by his relative acreage within the unit rather than by the law of capture.[69]

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[59] Harris, *supra* note 47, at 132.

[60] *E.g.*, Superior Oil Co. v. Beery, 216 Miss. 715, 719, 64 So. 2d 357, 360 (1953) (on suggestion of error); Harris, *supra* note 47, at 132.

[61] Harris, *supra* note 47, at 132.

[62] 238 Miss. 775, 119 So. 2d 759 (1960).

[63] *Id.* at 791, 119 So. 2d at 764.

[64] *Id.* at 790-91, 119 So. 2d at 763-64.

[65] *Id.* at 791-93, 119 So. 2d at 764-65.

[66] *Id.* at 792-93, 119 So. 2d at 764.

[67] *Id.* at 793-94, 119 So. 2d at 765.

[68] *See id.* at 790, 119 So. 2d at 763. MISS. CODE ANN. § 53-3-5(b), (c) (1972), provides that the Board shall regulate spacing and establish drilling units. *See* Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So. 2d 518 (1952) (law of capture must yield to conservation laws).

[69] 238 Miss. 775, 793, 119 So. 2d 759, 765 (1960). The common law rule of capture provided that a landowner could drill as many wells on his land as he desired and produce as much oil from these wells as possible. The neighboring landowner's recourse was to drill his own wells and capture oil for himself. *See* R. MYERS, *supra* note 1, at 25-29.

The Board order in this example determined the competing rights of the mineral owners by substituting for their respective property rights a right of participation in the production from the respective units as controlled by the conservation laws. The order effectively vested a right of participation in the mineral owners. Such a final order is adjudicatory in character: It is determined after providing notice and an opportunity for all parties to be heard;[70] it is an adjudication of fact; and it effectively creates substituted property rights. A final order of this nature should therefore be res judicata if rendered in a jurisdiction where the doctrine is applied to administrative decisions.[71]

III. Approaches to the "Amendability" Problem

A. Power to Amend or Modify Inherent in the Agency's General Powers

Based on the view that the functions of regulatory agencies are "legislative" in nature, some jurisdictions do not apply the doctrine of res judicata to administrative proceedings.[72] The right to amend or modify a prior conservation order is deemed to be inherent in the agency's general powers.[73] As a basis for permitting amendment, some jurisdictions have held that a change of condition is not necessary,[74] that an application to the agency itself to modify its order is not a collateral attack,[75] or that conservation orders in general are not res judicata.[76]

The basis for this position is the fundamental distinction between legislative and judicial power.[77] Judicial decisions are based solely upon

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[70] Board orders are "final" only when entered after petition, notice, and hearing. Watters, *supra* note 6, at 329. Often, for example, "drilling permits on units containing regular locations" are issued without a formal hearing. *Id.* Consequently, such orders are not final and interested parties may petition for a hearing. Miss. Code Ann. § 53-1-29 (1972); Watters, *supra* note 6, at 329. Due to their non-finality and contestability by interested parties, such orders are not res judicata.

[71] See section III *B. infra.*

[72] Mississippi River Fuel Corp. v. Illinois Commerce Comm'n, 1 Ill. 2d 509, 116 N.E.2d 394 (1953).

[73] Hartman v. State Corp. Comm'n, 215 Kan. 758, 529 P.2d 134 (1974); Railroad Comm'n v. Humble Oil & Ref. Co., 193 S.W.2d 824, 828 (Tex. Civ. App.), *aff'd per curiam*, 331 U.S. 791 (1946) ("This principle is now so well established as to require no citation of authority."); City of Fond Du Lac v. Department of Natural Resources, 45 Wis. 2d 620, 173 N.W.2d 605 (1970).

[74] Railroad Comm'n v. Humble Oil & Ref. Co., 193 S.W.2d 824 (Tex. Civ. App.), *aff'd per curiam*, 331 U.S. 791 (1946).

[75] Byrd v. Shell Oil Co., 178 S.W.2d 573 (Tex. Civ. App. 1944).

[76] Aylward Prod. Corp. v. State Corp. Comm'n, 162 Kan. 428, 176 P.2d 861, 869 (1947).

[77] *Developments in the Law—Res Judicata, supra* note 42, at 866.

past or existing rights at the time of final adjudication.[78] Such a final determination is binding as to both matters actually litigated and those "which might have been but were not actually litigated."[79]

In contrast, legislation must be sufficiently flexible to meet future needs. It would be unreasonable to contend that the legislature could not change or repeal its enactments. Jurisdictions adhering to the "inherent power" view apparently believe that an identical power must reside in a regulatory agency acting under delegated legislative authority. In this context, one writer has stated:

> As in the case of all administrative law and regardless of what may appear to be characteristics similar to judicial orders, conservation orders are, of necessity, legislative and must be so treated. Such orders are authorized by the legislature to carry out and give effect to a legislative function under standards prescribed by the legislature; they constitute a delegation of legislative authority.[80]

A number of decisions adhering to this view have held that because the res judicata concept was developed in the context of successive court actions, the doctrine should not create a preclusive effect on administrative decisions.[81] Such statements have been criticized as too inflexible,[82] and the cases concluding that the doctrine of res judicata does not apply to administrative proceedings now appear to be in the minority.[83]

B. Amendment or Modification Appropriate Where Not Prohibited by the Doctrine of Res Judicata

The common law theory of res judicata is not per se applicable to administrative agencies.[84] In some jurisdictions, however, due to the policies underlying this doctrine,[85] restrictions are placed, either by stat-

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[78] Weingart v. Kiessenback, 167 Ore. 15, 114 P.2d 147, 149 (1941); Rollins v. Bazile, 205 Va. 613, 617, 139 S.E.2d 114, 118 (1964); Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N.W. 856, 861 (1926); *see* RESTATEMENT OF JUDGEMENTS § 1, Comment *a* (1942).

[79] 2 K. DAVIS, *supra* note 39, § 18.01, at 546.

[80] Williams, *supra* note 39, at 437.

[81] *E.g.*, Pearson v. Williams, 202 U.S. 281, 284-85 (1906); Jason v. Summerfield, 214 F.2d 273, 276 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954); Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947).

[82] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966).

[83] *See* 2 K. DAVIS, *supra* note 39, § 18.02, at 554.

[84] *See id.* § 18.08, at 597.

[85] These policies may operate to foreclose litigation when a party attempts to reopen a matter once it has been decided. *See* Yavapai County v. Wilkinson, 111 Ariz. 530, 534 P.2d 735 (1975); Bockman v. Arkansas State Medical Bd., 229 Ark. 143, 313 S.W.2d 826 (1958).

ute[86] or judicial interpretation,[87] on the administrative agency's power to modify or amend its prior orders. Under this approach, the applicability of res judicata is dependent upon the nature of the order itself.[88]

In these jurisdictions, the authority of the regulatory commission to modify or amend a prior order can be found in the statutes.[89] In addition, a rule is generally set forth prohibiting collateral attack by applying res judicata to board orders.[90] The end result of this combination is that board orders can be modified or amended only (1) when there has been a substantial change of condition since the entry of the original order, or (2) when a weighing of the policies underlying the conservation laws and the finality of administrative determinations indicates that the doctrine of res judicata should be relaxed.

1. Substantial Change of Condition

Oklahoma provides an excellent example of adherence to the "substantial change" position.[91] The Oklahoma Code authorizes the Oklahoma Corporation Commission to amend or modify its orders.[92] The Code also provides, however, that no collateral attack upon Commission orders is permissible.[93] These provisions indicate that the Oklahoma Corporation Commission does have the power to amend or modify its orders, "but only when the superseding order escapes the taint of being classified as a collateral attack upon the former [order]."[94]

The requirement of a "change of condition" to allow amendment of board orders first appeared in *Wood Oil Co. v. Corporation Commission.*[95] After a pooling order had become final, the Commission

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[86] *E.g.*, OKLA. STAT. ANN. tit. 52, § 111 (West 1969).

[87] Bockman v. Arkansas State Medical Bd., 229 Ark. 143, 313 S.W.2d 826, 829 (1958); Andrews v. Gross & James Tie Co., 214 Ark. 210, 216 S.W.2d 386, 388 (1948); Jet Air Freight v. Jet Air Freight Delivery, Inc. 264 So. 2d 35, 40 (Fla. 1972); Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960).

[88] See section II *A. supra*.

[89] *E.g.*, MISS. CODE ANN. § 53-1-17 (Supp. 1976); OKLA. STAT. ANN. tit. 52, § 112 (West 1969); PA. STAT. ANN. tit. 58, § 407 (Purdon 1964).

[90] Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960); OKLA. STAT. ANN. tit. 52, § 111 (West 1969).

[91] For an excellent discussion of the Oklahoma position on modification of board orders, see Harris, *supra* note 47.

[92] Any person affected by any legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify, or supplement the same.

OKLA. STAT. ANN. tit. 52, § 112 (West 1969).

[93] "No collateral attack shall be allowed upon orders, rules and regulations of the Commission . . . ." *Id.* § 111.

[94] Harris, *supra* note 47, at 132.

[95] 205 Okla. 534, 239 P.2d 1021 (1950).

rejected an application to modify its order.[96] In affirming the Commission's action, the Oklahoma Supreme Court stated:

> The Corporation Commission is without authority to entertain or grant an application to vacate, amend or modify a spacing and well drilling unit established by a former order of the Commission, which has become final, *in the absence of a showing of a substantial change of condition in the area*, since the former order was made or other change of factual situations specified in the statutes.[97]

The burden of proving substantial change, however, is not insurmountable. In *Application of Continental Oil Co.*,[98] the court found that the applicant had satisfied its burden of establishing a substantial change in the knowledge of the conditions existing in the area subsequent to entry of the original order. The modification of the former order was necessary to assist in preventing waste and to protect correlative rights of the interested parties.[99]

In contrast, in some jurisdictions, such as Mississippi, the prohibition against collateral attack is not specifically set forth in the conservation laws but is the result of judicial interpretation.[100] But, regardless of how the prohibition arises, the result is the same: An amendment or modification is not permissible unless it is established that there has been a change of condition sufficient to warrant the proposed modification.

The types of changes sufficient to satisfy the requirement have been classified into three categories: (1) *internal change*—actual change in the physical structure of the reservoir brought about by development and depletion; (2) *external change*—a result of new evidence showing that the information originally acquired is incorrect; and (3) *technological change*—where new scientific knowledge adds "new dimensions to the basic legal concepts of waste and correlative rights . . . ."[101] While there is some question as to whether the third type of change satisfies the requirements, it has been effectively argued that

> a permanent building of static legal concepts simply cannot be erected

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[96] *Id.* at 536, 239 P.2d at 1022.

[97] *Id.* at 535, 239 P.2d at 1021 (emphasis added). Subsequently, in Carter Oil Co. v. State, 205 Okla. 374, 377-78, 238 P.2d 300, 303-04 (1951), the Corporation Commission, after issuing an order establishing a well spacing and drilling unit, was held to be without authority to review and modify the order in the absence of a substantial change of condition.

[98] 376 P.2d 330, 334-35 (Okla. 1962).

[99] *Id.* at 335.

[100] *See* Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960).

[101] Harris, *supra* note 47, at 132-33.

> on a foundation which consists of the shifting sands of scientific thought and technology. Should tomorrow's knowledge brand today's order as one conducive to waste, it is submitted that a change of condition is shown which is legally sufficient to support modification.[102]

2. Relaxation of the Doctrine: Policy Considerations

The burden of proving a substantial change of condition to justify the amendment of board orders appears too inflexible for the administrative arena. Accordingly, there is a growing trend to allow amendment of administrative orders through a "relaxation" of the doctrine of res judicata.[103] In this context, Professor Davis has stated that

> [t]he key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that that principle should not be at all applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata.[104]

Under the Davis approach, the doctrine should be relaxed to an extent necessary to comport with public interests[105] and administrative policy.[106]

Some courts have applied such a "relaxed" doctrine to administrative decisions dealing with the conservation laws.[107] Generally, the doctrine should be relaxed only after examining the public interest in finality of determinations, the policies underlying the conservation laws, and the policy behind the ownership of property. If the need for waste prevention and protection of correlative rights outweighs the need for finality, the doctrine should be relaxed so as to allow amendment or modification of the board order.

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[102] *Id.* at 134.

[103] *See* 2 K. Davis, *supra* note 39, § 18.03, at 568.

[104] *Id.*

[105] *See* Panhandle Eastern Pipe Line Co. v. FPC, 236 F.2d 289 (3d Cir. 1956).

> [T]he doctrine of res judicata can have no application to a proceeding . . . which involves a determination of the present or future public convenience or necessity with respect to . . . natural gas service.

Id. at 292.

[106] The starting point is usually the traditional doctrine as applied to judgments of courts; that doctrine should be qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice.

2 K. Davis, *supra* note 39, § 18.03, at 559.

[107] *See* Hartman v. Corp. Comm'n, 215 Kan. 758, 529 P.2d 134 (1974).

IV. Mississippi Law on Amending Board Orders

A. *Statutory Provisions*

The Mississippi State Oil and Gas Board possesses broad discretionary powers in the administration and enforcement of conservation laws.[108] The Board cannot, however, act in a purely judicial capacity and adjudicate questions of land title[109] or decide equitable questions of ownership.[110] As an agency of the legislature, the Board has only those powers delegated to it by the legislature[111] and acts primarily in an administrative capacity.

The Board's enabling statute provides: "The board shall have authority . . . to make, after notice and hearing . . . reasonable rules, regulations and orders . . . and to amend the same . . . ."[112] This statutory grant of power expressly includes adjudicatory orders which vest a participation right in the mineral owner. For example, included in the statute are the powers "[t]o regulate the spacing of wells, . . . to establish drilling units" and "[t]o allocate and apportion the production of oil or gas . . . among or between tracts of land under separate ownership" in a given pool.[113]

The enabling statute does not expressly limit the Board's power to amend its orders, including those adjudicatory orders which vest a participation right.[114] Thus, on the face of the statutory provisions, it would appear that no problem exists and that the Board possesses the power to amend any of its orders without initially satisfying a required standard for amendableness. The Mississippi Supreme Court, however, has interpreted these statutes to prohibit collateral attack of final adjudicatory Board orders.[115]

B. *Judicial Limitations: The Applicability of Res Judicata*

Although the actions of the State Oil and Gas Board are technically legislative, the Mississippi Supreme Court does recognize the adjudica-

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[108] *See* Corley v. State Oil & Gas Bd., 234 Miss. 199, 211-12, 105 So. 2d 633, 638 (1958); Miss. Code Ann. § 53-1-17 (Supp. 1976); Watters, *supra* note 6, at 326.

[109] Hutchings v. Humble Oil & Ref. Co., 59 So. 2d 103, 104 (Miss. 1952).

[110] State Oil & Gas Bd. v. Crane, 271 So. 2d 84, 87 (Miss. 1972).

[111] Masonite Corp. v. State Oil & Gas Bd., 240 So. 2d 446, 449 (Miss. 1970); Superior Oil Co. v. State Oil & Gas Bd., 220 So. 2d 602, 604 (Miss. 1969); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 839-40, 27 So. 2d 542, 544-45 (1946); Watters, *supra* note 6, at 324-25.

[112] Miss. Code Ann. § 53-1-17(c) (Supp. 1976).

[113] *Id.* § 53-1-17(c)(11), (12).

[114] *See id.*

[115] Frost v. Gulf Oil Corp., 238 Miss. 775, 793, 119 So. 2d 759, 765 (1960).

tory character of some Board proceedings.[116] It is also apparent that the doctrine of res judicata is, at least to some degree, applicable to these adjudicatory proceedings.[117]

Several of the Mississippi Supreme Court decisions indicating that adjudicatory Board proceedings are res judicata concern Board orders promulgated under the provisions of the original enabling statute.[118] Unlike section 53-1-17, the original statute did not expressly authorize the Board to amend its orders.[119] Nevertheless, a cursory examination of some of these decisions will aid in determining the degree to which adjudicatory Board proceedings are res judicata.

In *Superior Oil Co. v. Foote*,[120] landowner lessors contested the integration of their interests into pooled gas units established by the lessees during the primary lease term. Because no notice or hearing was provided, the lessors contended that the Board's order was ineffective to establish the pooled units.[121] The court, in rejecting this contention, found that notice to the lessees, as representatives of the landowners, was sufficient[122] and that since notice and hearing were provided, the Board's order effectively adjudicated the establishment of the pooled units.[123] No express reference was made to either res judicata or collat-

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[116] *Id.* at 792-93, 119 So. 2d at 764 ("order adjudicated all things necessary for the establishment of said units"); Superior Oil Co. v. Beery, 216 Miss. 715, 721, 64 So. 2d 357, 361 (1953) (order "adjudicated that the lands in question 'have been . . . established as gas drilling and producing' "); Superior Oil Co. v. Foote, 214 Miss. 857, 879-80, 59 So. 2d 85, 95 (1952) (Board order after notice and hearing adjudicates rights of parties as to general spacing and drainage); State Oil & Gas Bd. v. Superior Oil Co., 202 Miss. 139, 154, 30 So. 2d 589, 593 (1947) (rules subjected to petition for hearing "taken out of their legislative character"). Decisions concerning other administrative agencies also recognize the legislative-judicial dichotomy. City of Jackson v. Holliday, 246 Miss. 412, 419, 149 So. 2d 525, 527 (1963); Watkins v. State Bd. of Phramacy, 170 Miss. 26, 32, 154 So. 277, 278 (1934). *See also* Dixie Greyhound Lines, Inc. v. Public Serv. Comm'n, 190 Miss. 704, 713, 200 So. 579, 580 (1941) (dictum).

[117] Frost v. Gulf Oil Corp., 238 Miss. 775, 793, 119 So. 2d 759, 765 (1960); State Oil & Gas Bd. v. Superior Oil Co., 202 Miss. 139, 151, 30 So. 2d 589, 592 (1947); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542, 544 (1946); *cf.* Superior Oil Co. v. Beery, 216 Miss. 715, 721, 64 So. 2d 357, 359 (1953); Superior Oil Co. v. Foote, 214 Miss. 857, 879-80, 59 So. 2d 85, 95 (1952). Decisions concerning other agencies apply res judicata to those proceedings. City of Jackson v. Holliday, 246 Miss. 412, 419, 149 So. 2d 525, 527 (1963); Watkins v. State Bd. of Pharmacy, 170 Miss. 26, 32, 154 So. 277, 278 (1934).

[118] Superior Oil Co. v. Beery, 216 Miss. 715, 716-18, 64 So. 2d 357, 359 (1953); Superior Oil Co. v. Foote, 214 Miss. 857, 879-80, 59 So. 2d 86, 95 (1952); State Oil & Gas Bd. v. Superior Oil Co., 202 Miss. 139, 151-52, 30 So. 2d 589, 592 (1947); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 838, 27 So. 2d 542, 544 (1946).

[119] Miss. Laws ch. 117, § 5 (1932).

[120] 214 Miss. 857, 59 So. 2d 85 (1952).

[121] *Id.* at 879, 59 So. 2d at 94.

[122] *Id.* at 879-80, 59 So. 2d at 94-95.

[123] *Id.* at 879, 884, 59 So. 2d at 95, 97.

eral attack in the court's opinion. Considering the finality of the Board order after notice and hearing, however, it is apparent that the court viewed the proceeding as res judicata.

The decision of *State Oil and Gas Board v. Superior Oil Co.*[124] clearly applies the doctrine of res judicata to an order of the Board. Rather than appeal an integration order within the statutory 10-day appeal period, the landowners in *Superior Oil* filed a second petition with the Board.[125] The landowners appealed the Board's dismissal of this second petition, but the court ruled that the original unappealed order of the Board was final.

> "[M]ost assuredly, the statute does not contemplate that two hearings shall be had upon the same issue between the same parties and on the same evidence."
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> . . .
>
> [The original order] from which no appeal was taken . . . must remain a closed chapter, so far as concerns any further petition by them unless and until there have been some substantial changes in the pertinent conditions, some new developments, or discoveries, or some different new order made by the Board itself . . . .[126]

Thus, the original Board order was res judicata and could not be collaterally attacked.

These decisions apply the doctrine of res judicata with a conspicuous absence of explicit reference to it. Nevertheless, the language and result of these cases leave the impression that res judicata is being applied in a manner comparable to that of the strict judicial doctrine. Thus, one might surmise that the Mississippi Supreme Court, at least initially, adhered to an inflexible application of res judicata to administrative proceedings. Such conjecture is buttressed by a statement regarding res judicata of administrative proceedings in *Watkins v. State Board of Pharmacy*.[127]

> "[I]n a second action between the same parties, or their privies, although the causes of action may be different, the judgment in the first action is res adjudicata in the second as to any point or question actually litigated and determined in the first." The rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to judicial and quasi-judicial acts of public, executive, or administrative officers and boards acting within their jurisdiction as to judgments of courts.[127.1]

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[124] 202 Miss. 139, 30 So. 2d 589 (1947).

[125] *Id.* at 148-49, 30 So. 2d at 590.

[126] *Id.* at 151, 30 So. 2d at 592 (citation omitted).

[127] 170 Miss. 26, 154 So. 277 (1934).

[127.1] *Id.* at 32, 154 So. at 278 (citation omitted).

This statement has prompted one commentator to conclude that Mississippi applies the doctrine of res judicata to administrative proceedings to an unnecessary extreme.[128] While such a conclusion is warranted by *Watkins* and is possibly implicit in *Foote* and *Superior Oil,* it should be drawn with caution from *Foote* and *Superior Oil* since these two cases decided only that a second hearing could not be conducted on identical evidence. Assuming the accuracy of the above conclusion, later decisions indicate a more flexible application. It should be noted that the cases discussed above were decided under the original enabling statute which granted no specific amendatory authority to the Board.[129]

Section 53-1-17 of the Mississippi Code facially empowers the Board to amend its orders without limitation. As evidenced by *Frost v. Gulf Oil Co.,*[130] however, the doctrine of res judicata continues to apply to some extent. In *Frost,* landowners within certain pooled gas units contended that their interests had not been integrated effectively by a Board order establishing units for the pool.[131] The court, however, held that since the order had been entered "after due notice to all parties,"[132] collateral attack was precluded: "The [landowners] made no appearance before the Board at the hearing resulting in the order. They cannot now make a collateral attack on that order."[133]

Thus, it is clear that the doctrine of res judicata remains applicable to adjudicatory Board orders promulgated under the current statute. The rigidity of the doctrine's application, however, is not so apparent. In every case in which the court has applied the doctrine of res judicata, the petitioners have attacked the order with evidence identical to that presented in the initial hearing in an attempt to relitigate identical issues.[134] No Mississippi case has been found that addresses the res judicata issue when new or additional evidence was presented. It is therefore unclear whether the prohibition of collateral attack is a proscription of a rehearing of issues that might have been presented as well as those that were actually decided.

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[128] 2 K. Davis, *supra* note 39, § 18.02, at 556 n.33.

[129] Miss. Laws ch. 117, § 5 (1932).

[130] 238 Miss. 775, 119 So. 2d 759 (1960).

[131] *Id.* at 792-93, 119 So. 2d at 764-65. See text accompanying notes 62 through 69 *supra* for a more detailed discussion of the facts.

[132] 238 Miss. at 792, 119 So. 2d at 764.

[133] *Id.* at 793, 119 So. 2d at 765. Obviously, the court is equating collateral attack with res judicata, since the appeal in *Frost* concerned an attempted second hearing on the very facts adjudicated during the original hearing in which the units were established. *Id.* at 792-93, 119 So. 2d at 764-65.

[134] *E.g.,* Frost v. Gulf Oil Corp., 238 Miss. 775, 119 So. 2d 759 (1960); State Oil & Gas Bd. v. Superior Oil Co., 202 Miss. 139, 30 So. 2d 589 (1947); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946).

It is clear, however, that some Board orders which have vested a participation right can be amended. The decision in *Corley v. State Oil & Gas Board*[135] is directly on point. In *Corley,* a pool was being produced under a voluntary unitization plan.[136] Owners who had joined the unitization agreement participated in the production from the entire unit according to their relative acreage within the field-wide unit.[137] The allowable daily production for the pool was set by the maximum efficient ratio (MER).[138] After the field acreage had been established and the unitization plan approved by the Board, the operator petitioned to extend the limits of the unit to include additional acreage.[139]

The Board entered an order extending the unit area to include this additional acreage.[140] In so ordering, the Board found that the pool did lie under the additional acreage, that no additional wells were necessary to efficiently drain the additional area, and that the MER of the field should remain unchanged.[141] Thus, the allowable daily production for the entire field remained unchanged. The effect of this amending order was to reduce the participation accorded each mineral owner by the original order.

The non-signing owners appealed the Board's amending order on two grounds. First, they contended that the Board had no power to establish different size units for a pool. The court rejected this contention, finding that the statute empowered the Board to regulate spacing and establish drilling units. The court explained that "[t]his grant of power places no restriction on the Board except that the rule must be reasonable."[142] This portion of the decision, while not concerned with the power to amend, aptly illustrates the broad power of the Board as approved by the Mississippi Supreme Court.

Secondly, the non-signing owners contended that the Board had no power to cut their allowable daily production.[143] The court sustained the Board's action, holding that it had power to reduce the allowable daily production and redefine the field where, as here, the order was supported by substantial evidence.[144]

Thus, *Corley* is authority for Board modification of prior orders

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[135] 234 Miss. 199, 105 So. 2d 633 (1958), *noted in* 31 MISS. L.J. 100 (1959).
[136] 234 Miss. at 205, 105 So. 2d at 635.
[137] *Id.* at 207-08, 105 So. 2d at 636-37.
[138] *Id.* at 208, 105 So. 2d at 636.
[139] *Id.* at 205-07, 105 So. 2d at 635-36.
[140] *Id.* at 207-10, 105 So. 2d at 636-37.
[141] *Id.*
[142] *Id.* at 212, 105 So. 2d at 638.
[143] *Id.* at 215-16, 105 So. 2d at 640.
[144] *Id.*

which have vested a participation right.[145] The original unitization order in *Corley* had adjudicated the mineral owners' right to participate in production from the field. The subsequent order changed this participation right by reducing the amount of royalty to be received by each tract. The case is, however, ambiguous as to the evidentiary standard to be satisfied prior to the issuance of the amending order. The court stated that substantial evidence supported the Board's finding that the pool underlay the additional area.[146] But was this evidence unavailable at the time of the original hearing and later obtained, for example, by further exploration? It is necessarily true that the field expansion order was based on information not presented at the original hearing.[147] The case

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[145] A theoretical impediment exists as to the modification of participation rights in a pooled unit or fieldwide unit—the cross-conveyance theory. This theory states that voluntary pooling or unitization effects a cross-assignment between the landowners within the unit such that each royalty owner becomes owner of an undivided interest in all production from the unit. R. MYERS, *supra* note 1, § 13.02, at 435. The theory had its origin in Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472 (1942), and only Texas and California can definitely be said to follow it. R. MYERS, *supra* note 1, § 13.02, at 438.

There has been considerable speculation, however, that Mississippi would follow this cross-conveyance theory. *E.g.*, L. HOFFMAN, VOLUNTARY POOLING & UNITIZATION 180 (1954); H. WILLIAMS & C. MEYERS, *supra* note 20, § 930.4. This speculation is based primarily on Hudson v. Newell, 172 F.2d 848 (5th Cir. 1949), which speculated that Mississippi follows the cross-conveyance theory. That case, however, is questionable authority for this proposition inasmuch as it relies only on *Veal* and the court seemed unclear on oil and gas law, confusing pooled units and fieldwide units. *See id.* at 852.

The court's statement in Merrill Eng'r Co. v. Capital Nat'l Bank, 192 Miss. 378, 5 So. 2d 666 (1942), that a royalty interest is a real property interest, also has been cited as authority for Mississippi's adherence to the cross-conveyance theory. H. WILLIAMS & C. MEYERS, *supra* note 20, § 930.4. *Merrill,* however, does not mention the theory. Mr. Hoffman recognizes this fact and notes that the *Merrill* holding—that a subsequent conveyance of a tract within the unit does effect a conveyance of the corresponding royalty interest—is contrary to the cross-conveyance theory. L. HOFFMAN, *supra,* at 180.

Thus, it is evident that the Mississippi courts are undecided on the cross-conveyance theory. If the theory were followed, an established unit could not be modified without consent of all owners within the unit, since each would own an undivided interest. In view of *Corley*'s sanctioning of unit modification, however, the argument seems purely academic. In fact, *Corley* should support the proposition that Mississippi does not follow cross-conveyance.

A final reason the cross-conveyance theory should have no effect on unit modification is the very basis of the theory—that voluntary pooling effects an intent to cross-assign. Pooled units established in compliance with state spacing regulations are voluntary only in the sense that the lease includes the authority to pool. They are compulsory in that conservation laws require establishment of a drilling unit before drilling can be initiated. *See* MISS. CODE ANN. § 53-3-5 (1972). Because such units are in no sense purely voluntary, an intent to cross-assign should not be implied.

[146] 234 Miss. at 210-11, 213-14, 105 So. 2d at 636-37, 640.

[147] State Oil & Gas Bd. v. Superior Oil Co., 202 Miss. 139, 30 So. 2d 589 (1947) (two hearings cannot be had on the same evidence). *See also* Frost v. Gulf Oil Corp., 238 Miss.

is silent, however, as to whether the data defining the additional acreage was available at the time the unit was established, so that it might have been presented at the initial hearing. If such were the case, and the unit boundaries were predicated upon a mistake of fact, the traditional res judicata doctrine would prohibit subsequent modification of those boundaries.[148] Following this rationale, the unit modification would require a relaxation of the doctrine in order to comport with the policies of the conservation laws.[149] On the other hand, if the unit modiciation were based on a substantial change of condition, res judicata would not prohibit an amendatory order.[150] Some of the court's language infers that *Corley* was a policy decision[151] and thus involved a relaxation of res judicata.

Barnwell, Inc. v. Sun Oil Co.[152] indicates that either res judicata or conservation policy constitutes sufficient grounds for denial of an amendatory order. In that case, the Board denied appellants' petition for an amendment to certain field rules which would have effected an increase in their allowable daily production and a concomitant decrease in the other owners'.[153] The Mississippi Supreme Court ruled that the appellants had the burden of showing a change of condition subsequent to the original order and upheld the Board.[154] The court's holding connotes application of res judicata. Interspersed with this language, however, is a conservation policy discussion.[155] The court quotes language from *Corley* on conservation policy[156] and speaks in terms of fairness "to the

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775, 119 So. 2d 759 (1960); California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946).

[148] See text accompanying note 79 *supra*.

[149] The conservation laws embrace a policy that each owner within a common source "obtain his just and equitable share of production therefrom." MISS. CODE ANN. § 53-1-1 (1972).

[150] See text accompanying notes 101 & 126 *supra*.

[151] Reading the conservation objectives of the Act together with the power vested in the Board, and considering them in the light of the evidence in this case, we do not think it would be fair or equitable to permit a very small minority of small fractional owners in this common source of supply of hydrocarbons to prevent the Board and the overwhelming majority of the operating and royalty owners from pursuing a unitization program designed to obtain a maximum recovery from the field. The Board so decided, and at the same time made every reasonable effort to protect the co-equal and correlative rights of appellants.

234 Miss. at 218, 105 So. 2d at 641.

[152] 249 Miss. 398, 162 So. 2d 635 (1964).

[153] *Id.* at 403-05, 162 So. 2d at 637-38.

[154] *Id.* at 412, 162 So. 2d at 641.

[155] *Id.* at 409-10, 162 So. 2d at 639-41.

[156] *Id.*, 162 So. 2d at 639-40. See note 151 *supra*.

owners and parties of interest"[157] as grounds for denial of an amendatory order.

Perhaps the Mississippi Supreme Court's most definitive statement on res judicata of administrative proceedings was provided in *City of Jackson v. Holliday*.[158] This case involved the "application of the doctrine of res judicata to a municipal zoning ordinance for a particular lot."[159] Although the court did not determine whether the character of this proceeding was legislative or adjudicative,[160] it discussed the doctrine's application to administrative proceedings.

> The common law doctrine of res judicata, including the subsidiary one of collateral estoppel, is designed to prevent relitigation by the same parties of the same claims or issues. The reasons behind the doctrine, as developed in the courts, are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. The doctrine is best applied to an adjudication of past facts.[161]

Finding the administrative order to be res judicata, the court explained that this was not a case where "changed circumstances and new facts which did not exist at the time of the prior judgment" would allow a new hearing.[162]

The synthesis of these judicial decisions with the legislative enactments indicates that adjudicatory Board orders—those that vest a participation right—can be amended either where there is some substantial change of condition or where modification is necessary to comport with the policy of the conservation laws, viz. a relaxation of res judicata when necessary.

C. Administrative Action

The State Oil and Gas Board's administrative decisions provide interesting insight into the actions of the Board in modifying participation rights. These decisions indicate that the Board frequently reforms drilling units by shifting the position of the unit. Units have been realigned to form a new adjacent unit and permit drilling without granting an exception to the spacing requirements.[163] Drilling units also have

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[157] 249 Miss. at 409, 162 So. 2d at 640.

[158] 246 Miss. 412, 149 So. 2d 525 (1963).

[159] *Id.* at 416, 149 So. 2d at 526.

[160] *Id.* at 420, 149 So. 2d at 528. The court found that since the administrative decision had been affirmed by the circuit court, "the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision." *Id.* at 420, 149 So. 2d at 527-28.

[161] *Id.* at 419, 149 So. 2d at 527 (citations omitted).

[162] *Id.* at 420, 149 So. 2d at 528.

[163] *E.g.*, 25 Miss. Oil & Gas Bd. Adm. Decisions 20 (Jan. 1976); 25 Miss. Oil & Gas Bd. Adm. Decisions 23 (Jan. 1976).

been reformed to allow the lessee to take advantage of strata information obtained by drilling wells on established units.[164] The important point to note, however, is that in each of these reformations, the Board ensured that the owners in interest were identical both before and after reformation.[165] The owners in interest were altered only in instances where such action was authorized or required by the conservation laws.[166] For example, where the unit was established for oil production and a gas-only well was discovered, the unit was reformed to a gas unit of greater size.[167] Perhaps these decisions indicate that the Board is not certain of its non-statutory power to modify participation rights. On the other hand, they could indicate that the Board merely avoids altering participation rights unless absolutely necessary and clearly supported by new evidence.

V. Conclusion

Mississippi legislative enactments, judicial decisions, and Oil and Gas Board administrative decisions fail to delineate clearly the standard which must be satisfied to allow amendment of orders vesting participation rights. In light of both Mississippi decisions concerning other administrative agencies and the growing trend in other jurisdictions concerning administrative proceedings, the Board's power to amend adjudicatory orders is apparently limited by a flexible application of the doctrine of res judicata. Modification of a final order vesting participation rights must therefore be premised upon either a substantial change of condition or a relaxation of the doctrine of res judicata. Such standards seem adequate in that they allow modification where equities demand it, and yet, the requisite finality of property ownership is provided under other circumstances.

The standard of substantial change of condition encompasses many of the situations calling for amendment of an order which has vested a participation right. Under this standard, the usual instance where the Board reforms or expands a drilling unit is covered.

In addition, the substantial-change standard would encompass a *Corley*-type problem if the field-wide unit were established and subsequently expanded after further developments revealed extended reser-

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[164] *E.g.*, 25 Miss. Oil & Gas Bd. Adm. Decisions 78 (Feb. 1976); 25 Miss. Oil & Gas Bd. Adm. Decisions 26 (Jan. 1976).

[165] *See* notes 163 and 164 *supra*.

[166] *E.g.*, 25 Miss. Oil & Gas Bd. Adm. Decisions 84 (Feb. 1976); 25 Miss. Oil & Gas Bd. Adm. Decisions 6 (Jan. 1976). The conservation laws provide that drilling units for oil and drilling units for gas be of different size. Miss. Code Ann. § 53-3-5 (1972).

[167] 25 Miss. Oil & Gas Bd. Adm. Decisions 84 (Feb. 1976).

voir limits. On the other hand, if the original unit boundaries were established merely upon a mistake of fact, conservation policies would demand a relaxation of res judicata to prevent waste and permit an equitable sharing of production among the owners of the common source. In fact, one would speculate that a relaxation of the doctrine of res judicata was followed in *Corley* without the court characterizing it as such.

Finally, the substantial-change standard would sanction unit modification in a *James* or *Millette*-type situation, thus resolving the double royalty problems. Assume, for example, after establishment of drilling units as in *James*, further development revealed the fault situated so that no production was contributed by acreage south of it. Unit modification could then be predicated on this change of condition, and the units could be restructured so that productive acreage is included within a north unit. The landowner would then be compensated without a payment of double royalty by the lessee. Similarly, in a *Millette*-type situation, where further development or depletion has revealed substantial drainage from adjacent property, but an additional well would be unprofitable, unit modification to include the productive acreage would avoid the double royalty situation and yet allow just compensation for the landowner.

Unit modification in a *James* or *Millette*-type situation is not so easily predicated upon a relaxation of res judicata. Both decisions were grounded on allowing each landowner to share in production according to his acreage, thus following the mandates of the conservation laws. The lessee, however, is also "an owner in a common pool" and relaxation might be predicated on his inequitable share. At any rate, the substantial-change standard seems adequate to cope with this particular problem.

Charles Glen Bush
Charles David Swenson

RECENT DECISIONS

CONSTITUTIONAL LAW—EQUAL PROTECTION—STATE MANDATORY RETIREMENT LAW NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE

Appellee, a state police officer, brought a civil action[1] against the Massachusetts Board of Retirement to enjoin[2] enforcement of a Massachusetts statute[3] which required all uniformed state police officers to retire at age 50.[4] The officer, who had been involuntarily retired, contended that the mandatory retirement law discriminated against him in violation of the equal protection clause[5] of the fourteenth amendment. The district judge refused to take jurisdiction and dismissed the complaint for failure to allege a substantial constitutional question.[6] The United States Court of Appeals for the First Circuit vacated the district

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[1] Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1343(3) (1970), which provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> (3) [t]o redress the deprivation under color of any State law . . . any right . . . secured by the Constitution of the United States . . . .

[2] Relief was sought pursuant to 42 U.S.C. § 1983 (1970), which allows relief at law or in equity for the deprivation of any right secured by the Constitution or laws of the United States.

[3] MASS. GEN. LAWS ANN. ch. 32, § 26(3)(a) (1966), provides, *inter alia,* that

> [a]ny . . . officer . . . who has performed service in the division of the state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

[4] Although section 26(3)(a) purports to allow those who have not had 20 years service to work past age 50, this provision has little application since MASS. GEN. LAWS ANN. ch. 22, §9A (1966), prohibits the appointment of males over 30 years of age to the state police force.

[5] Although not within the scope of this Note, mandatory retirement statutes have been challenged on numerous grounds other than equal protection, including: (1) substantive due process, *see* Townsend v. County of Los Angeles, 49 Cal. 3d 263, 269-70, 122 Cal. Rptr. 500, 504 (2d Dist. 1975); (2) procedural due process, *see, e.g.*, Norman v. United States, 392 F.2d 255, 259 (Ct. Cl. 1968), *cert. denied,* 393 U.S. 1018 (1969); Campbell v. Aldrich, 159 Ore. 208, 79 P.2d 257, *dismissed for want of a substantial federal question,* 305 U.S. 559 (1938); (3) violation of the Age Discrimination in Employment Act, McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973), *dismissed for want of a substantial federal question sub nom.,* McIlvaine v. Pennsylvania, 415 U.S. 986 (1974); and (4) violation of state age discrimination statutes, American Airlines, Inc. v. State Comm'n for Human Rights, 29 App. Div. 2d 178, 286 N.Y.S.2d 493, 499 (Sup. Ct. 1968). *See also* Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment,* 47 S. CAL. L. REV. 1311 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 HARV. L. REV. 1534 (1974).

[6] Murgia v. Massachusetts Bd. of Retirement, 345 F. Supp. 1140, 1143-44 (D. Mass. 1972).

court's dismissal and remanded the case with an order to convene a three-judge court.[7] On remand, the district court found for the officer.[8] On appeal to the United States Supreme Court, *held*, reversed. Where a state statute which requires mandatory retirement for state police officers is rationally related to the state's goal of providing a physically fit police force for the protection of persons and property, there is no violation of the equal protection clause. *Massachusetts Board of Retirement v. Murgia*, 96 S. Ct. 2562 (1976).

In reviewing a statutory classification which allegedly violates the equal protection clause, the United States Supreme Court has traditionally applied a two-tiered analysis.[9] The upper tier of the equal protection dichotomy—the "strict scrutiny" standard—is employed when the legislative classification under review infringes upon a "fundamental interest"[10] or involves a "suspect classification."[11] Under this more exacting level of scrutiny, the classification will be held unconstitutional unless the state can show that the classification is "necessary to promote a compelling governmental interest."[12] Plaintiffs histori-

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[7] Unreported memorandum.

[8] The district court found the mandatory retirement statute unconstitutional, Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 754-56 (D. Mass. 1974), and subsequently ordered that appellee be reinstated to his former position. Murgia v. Massachusetts Bd. of Retirement, 386 F. Supp. 179, 181-82 (D. Mass. 1974), *aff'd mem.*, 421 U.S. 972 (1975).

[9] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969); 45 MISS. L.J. 1056, 1057-59 (1964). *See generally* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[10] A fundamental interest is a right which the Court has found to be explicitly or implicitly guaranteed by the Constitution and is therefore entitled to special consideration under the equal protection clause. *See* Shapiro v. Thompson, 394 U.S. 618, 630-34 (1969). Among the rights which have been afforded this special protection are: (1) the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); (2) the right to privacy, Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965); (3) the right of a criminal defendant to counsel on appeal, Griffin v. Illinois, 351 U.S. 12, 17-19 (1956); (4) the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and, to a more limited extent, (5) the right to travel, *compare* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* Sosna v. Iowa, 419 U.S. 393, 406-07 (1975).

[11] A suspect class is a politically powerless segment of society which has historically been subjected to injurious discrimination under color of governmental authority and is consequently deserving of special protection under the fourteenth amendment. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). The following classifications have been deemed suspect: (1) race, Loving v. Virginia, 388 U.S. 1, 9, 11-12 (1967); (2) alienage, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1968); (3) national ancestry, Oyama v. California, 332 U.S. 633, 646 (1948). A plurality Court in Frontiero v. Richardson, 411 U.S. 677, 688 (1973), indicated that sex also constitutes a suspect class. *But see* Kahn v. Shevin, 416 U.S. 312 (1974).

[12] Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *accord*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); *cf.* Korematsu v. United States, 323 U.S. 214, 216 (1944). The state's burden to show a compelling governmental interest is formidable. As a result, the Court has been unwilling to recognize new fundamental rights or suspect classifications to which this test would be applied. *See, e.g.*, Lindsey v. Normet, 405 U.S.

cally have maintained that compulsory retirement laws should be subjected to strict scrutiny on the grounds that a classification based on age is suspect or, alternatively, that such laws interfere with an alleged fundamental right to work. In *Weiss v. Walsh*,[13] for example, an eminent professor of philosophy, who had been offered a prestigious position at Fordham University only to have the offer revoked when university officials discovered he was over 65, contended that classifications based on age are inherently suspect and strict scrutiny should thus be applied. In rejecting this argument, the district court reasoned that since age-based classifications apply equally to all racial, religious and economic groups, it is not a suspect classification.[14] Similarly, in *Townsend v. County of Los Angeles*,[15] an alleged fundamental right to work was invoked. Townsend, a deputy public defender, challenged a law requiring county servants to retire at age 65. In considering this attack, the district court acknowledged a fundamental right to pursue a lawful occupation but concluded that there was no fundamental right to work for a particular employer. Accordingly, the court refused to employ strict scrutiny.[16]

The lower tier in the traditional mode of analysis—the "rational basis" standard—is applied where neither a fundamental right nor a suspect classification is involved.[17] Under this test, the constitutionality of the challenged legislation will be upheld if the state can show that the classification is rationally related[18] to a legitimate governmental interest.[19] Theoretically, the person challenging such legislation bears "the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[20] In practice, however, a

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56, 73-74 (1973) (refused to find a fundamental right to decent housing); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (refused to categorize wealth as a suspect classification).

[13] 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd mem.*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

[14] 324 F. Supp. at 77; *accord*, Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975). *See also* Aronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974).

[15] 49 Cal. App. 3d 363, 122 Cal. Rptr. 500 (2d Dist. 1975).

[16] *Id.* at 502; *accord*, Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974).

[17] *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 2-8 (1973), in which the Court applied the rational connection test after concluding that classifications based on wealth are not suspect and that education is not a fundamental right.

[18] *See* McGowan v. Maryland, 355 U.S. 420 (1961). In upholding a Sunday closing law, the Court stated:

> [T]he Fourteenth Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.

Id. at 425.

[19] New Orleans v. Dukes, 96 S.Ct. 2513, 2516-17 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

[20] Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 79 (1911). The rational basis test's presumption of constitutionality erects a virtually insurmountable barrier in the path of the aggrieved party. In New Orleans v. Dukes, 96 S.Ct. 2513 (1976), the Court

discriminatory classification will be upheld if any state of facts reasonably can be conceived to justify it.[21] A typical case of low scrutiny review is *Armstrong v. Howell.*[22] In *Armstrong,* an involuntarily retired county hospital employee asserted that since the county's mandatory retirement provision did not apply to all county employees it could not withstand even the rational connection test. The court, however, concluded that the classification was rationally related to the goals of providing all citizens an equal opportunity for county employment and of improving efficiency in county labor.[23]

During recent years, a changing Supreme Court[24] has signaled a growing discontent[25] with the rather arbitrary two-tier equal protection model. Although

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upheld a city ordinance which banned the selling of food from pushcarts but exempted all vendors who had worked in the area for over eight years. In so doing, the Court overruled Morey v. Doud, 354 U.S. 457 (1957), calling that case an "intrusive infringement on the State's legislative powers." *Id.* at 5077. *Morey,* as the Court noted, was the only case in the last half century in which a state economic regulation was found to violate the equal protection clause. *Id. But see* United States Dept. of Agri. v. Moreno, 413 U.S. 528 (1973), wherein the Court applied low scrutiny to strike down a section of the Food Stamp Act which excluded any household which contained unrelated members from participation in the food stamp program.

[21] For example, in Dandridge v. Williams, 397 U.S. 471, *reh. denied,* 398 U.S. 914 (1970), the Court found a rational connection between the state's interest in encouraging employment and a state regulation which limited Aid to Families with Dependent Children payments to $250 per month regardless of the number of children in the family. Such "reasoning" has its roots in the earlier decision of Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). In *Kotch,* the Court reached the absurd conclusion that a statute which allowed only friends and family of river pilots to obtain pilot licenses was rationally related to the state's articulated purpose of licensing only competent pilots.

[22] 371 F. Supp. 48 (D. Neb. 1974).

[23] *Id.* at 53; *accord,* Lewis v. Tucson School Dist., 23 Ariz. App. 154, 531 P.2d 199 (1975), *cert. denied,* 423 U.S. 864 (1976) (mandatory retirement law requiring primary and secondary school teachers to retire at age 65 but not affecting college teachers is reasonably related to requirement that a teacher be able to control young people); McCarthy v. Sheriff of Suffolk County, 322 N.E.2d 758 (Mass. 1975) (compulsory retirement of court officers at age 65 is reasonably related to public safety); Fabio v. St. Paul, 267 Minn. 273, 126 N.W.2d 259 (1964) (mandatory retirement of city policemen reasonably related to need for more vigorous employees). *But cf.* Nelson v. Miwa, 546 P.2d 1005, (Hawaii 1976) (mandatory retirement provision for college professors denied equal protection because not all college professors were required to retire upon attaining the retirement age).

[24] There have been five Justices to join the Court since 1969: Chief Justice Burger (1969); Justice Blackmun (1970); Justices Powell and Rehnquist (1972); and Justice Stevens (1975).

[25] *E.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Chicago Police Dep't v. Mosely, 408 U.S. 92 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); see Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 17-18 (1972). Professor Gunther states:

> The emerging model of modest interventionism would have the courts do more than they have done for the last generation to assure rationality of means, without unduly impinging on legislative prerogatives regarding ends.

this mode of analysis is still in a state of flux, recent decisions indicate that the Court may formulate a new test which would provide an intermediate level of scrutiny. In *Reed v. Reed*,[26] the first case to indicate a possible doctrinal shift, the Court struck down a provision of the Idaho Probate Code which gave preference to men over women for appointment as administrators of estates. The Court refused to find a rational relation between the state's justification that such preferential treatment eliminated the need for hearings on the merits and the state's legitimate interest in economic efficiency. More importantly, the Court gave notice that a classification must have a "fair and substantial relation"[27] to the legislative objective. Under this newer method of analysis, the actual purpose of the classification is scrutinized instead of hypothesizing a rational legislative intent. Moreover, to justify an allegedly discriminatory classification, the state must show that it bears a substantial correlation to a legitimate legislative purpose. Unfortunately, the Court has applied this newer equal protection test infrequently and inconsistently.[28] In the mandatory retirement context, this test has been applied but once and only in the context of a dissenting opinion at the state court level.[29]

In the instant case, the Court reasoned that since state police officers over age 50 have not been historically subjected to unequal treatment and do not constitute a politically impotent minority, they do not constitute an inherently

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Id. at 23. *See also* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071, 1071-79 (1974).

[26] 404 U.S. 71 (1971).

[27] The Court reasoned:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .

Id. at 76.

[28] For examples of the Court's application of the new equal protection test, see Craig v. Boren, 45 U.S.L.W. 4057 (U.S. Dec. 20, 1976) (invalidating state statutory scheme which allowed females to purchase beer at age 18 but prohibited purchases by males under 21), Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a state statute which set the age of majority at 18 for females and 21 for males), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a state statute which prohibited distribution of contraceptives to unmarried persons but allowed distribution to married persons). *But see* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a state statute which required one year state residency in order to petition for divorce); Village of Belle Terre v. Borass, 416 U.S. 1 (1974) (upholding zoning ordinance which prohibited more than two unrelated persons from living in the same house).

[29] McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973), *dismissed for want of a substantial federal question sub nom.*, McIlvaine v. Pennsylvania, 415 U.S. 986 (1974). The dissenters argued for application of the more rigorous standard afforded by the intermediate level of scrutiny under which they maintained that the discriminatory classification would be forced to have a "significant relationship" to the legislative purpose. 309 A.2d at 811. The dissent found that the state's evidence failed to meet this standard insofar as its evidence failed to show such a relationship between the mandatory retirement age of 60 for state police officers and the plaintiff's performance as a troop commander. *Id.*

suspect class.[30] Noting that there is no fundamental right to employment, the Court reasoned that there was no interference with any recognized fundamental right.[31] Since there was no suspect class or fundamental right involved, the Court concluded that strict scrutiny was not the appropriate standard of analysis.[32] Applying the rational basis test, the Court determined that since mandatory retirement for uniformed state police at age 50 was reasonably related to the legitimate governmental goal of providing a vigorous police force for maintaining law and order, there was no denial of equal protection of the law.[33]

In a forceful dissent which reiterated his discontent with the traditional equal protection dichotomy,[34] Justice Marshall reasoned that since the right to work is so closely related to the right to personal freedom, and since older workers undeniably have been discriminated against in employment, closer scrutiny should be applied regardless of whether a recognized fundamental right or suspect class is involved.[35] Cognizant of the positive correlation between retirement and decrease in life expectancy, Justice Marshall concluded that the employee's interest in continued employment outweighed the state's interest in perpetuating an overinclusive mandatory retirement policy. This was especially true since the state's goal of providing physically fit police officers for the protection of society could so easily be fulfilled by continuing the rigorous physical examinations already required of officers below age 50.[36]

In the instant case, the Court justifiably refused the invitation to categorize age as a suspect classification. The aged, as a class, do not suffer from the political impotency which has traditionally characterized suspect classes.[37] On the contrary, the aged comprise the most politically active age group in our

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[30] Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2566-67 (1976).

[31] *Id.* at 2566.

[32] *Id.* at 2567.

[33] *Id.* at 2567-68.

[34] Mr. Justice Marshall has formulated a "sliding scale" approach designed to allow the Court greater flexibility in redressing legislative incongruities without requiring the Court to "dream up" fundamental interests or devise new suspect classes. Justice Marshall describes the "sliding scale" test in this manner:

> As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting). Under this mode of analysis, the nature of the class could be considered regardless of whether it was "suspect." The burden the legislation placed on a group would be relevant to the issue even if it did not interfere with a recognized fundamental right, and the articulated purpose of the state in creating the artificial classification would be weighed against the other factors. *Id.* at 102-03.

[35] 96 S. Ct. at 2570-71 (Marshall, J., dissenting).

[36] *Id.* at 2572-73 (Marshall, J., dissenting).

[37] *But see* Comment, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748, 768 (1975) (maintaining that the incohesiveness of the aged as a group prevents them from overcoming their inferior status through political action).

society in terms of voter participation.[38] Furthermore, unlike the traditional suspect classes such as race and alienage, members of the older segment of the population hold vital positions in all of the decision-making branches of government.[39] While it is true that the elderly have historically been subjected to discrimination in employment, they are often benefited by legislation which grants them special advantages not afforded the rest of the population.[40] Such special privileges are contrary to the traditional indicia of a suspect class. The Court was also wise in refusing to conjure up a fundamental right to employment. Although the right to earn a living is related to the enjoyment of the liberties guaranteed by the Constitution, the right to work in itself should not be found to be a constitutionally secured right. Such a loose construction of the Constitution would necessitate the application of strict scrutiny to all legislation even tangentially restricting employment opportunities. This type of judicial overkill is not needed for assailing the single problem of age discrimination in employment. But the Court's retreat to the "traditionally toothless"[41] rational connection standard was an abdication of its vital function of ensuring that the similarly situated are similarly treated by the separate legislative branches. State-ordered retirement adversely affects the retiree economically,[42] psychologically,[43] and physically.[44] The rational basis mode of analysis is too shallow an

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[38] In the 1974 national elections, for example, the median age for participating voters was 46.5 years. In those same elections, 51.4 percent of the voters in the "65 years and over" age bracket voted while a mere 20.8 percent in the "18 through 20" age group participated. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 450 (96th ed. 1975).

[39] It is general knowledge that the seniority systems which exist in the state and national legislatures give the older members of those assemblages disproportionate power. In addition, life tenure for many judges keeps this age group well represented in the ranks of the judiciary.

[40] *See, e.g.*, Health Insurance for the Aged and Medical Assistance, 42 U.S.C. §§ 1395 *et seq.* (1970); Health Insurance for the Aged, 42 U.S.C. §§ 3001-67 (Supp. 1973), *amending* 42 U.S.C. §§ 3001-54 (1970). *See also* Comment, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549, 556-57 (1976).

[41] Gunther, *supra* note 25, at 18-19.

[42] When an older worker is removed from employment he faces a severely limited job market. Government figures for 1970 show that the average duration of unemployment for men over 45 years old was nearly twice that of young men under 25 years of age. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1721, THE EMPLOYMENT PROBLEMS OF OLDER WORKERS 7 (1971). Since pensions are usually not adjusted to the cost of living, the retiree's real income disminishes due to inflation. Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 154 (1971). *See also* Comment, *Age Discrimination and the Over-Sixty-Five Worker*, 3 CUM.-SAM. L. REV. 333 (1973); Note, *Age Discrimination in Employment Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1318-20 (1974).

[43] The major psychological problem created by forced retirement is that it deprives the retiree of his dignity and feeling of usefulness. This deprivation can result in dejection, neurotic depression and even suicide. *See* Comment, *supra* note 37, at 755-59; Note, *Too Old to Work—The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 155-58 (1971).

[44] Studies indicate that retired men, on the average, live only 2½ years after termina-

analytic framework with which to consider such a multifaceted problem. The Court, while cognizant of the grave consequences of mandatory retirement, admitted that it could not consider these factors while employing low scrutiny.[45] Since the new, more exacting, equal protection methodology would have brought these socio-economic and health factors before the Court, it would have been the more appropriate analytic standard. Under this intermediate level of scrutiny, as applied in *Reed v. Reed*,[46] the rationality of the classification would not be presumed on the basis of the assumed fact that men over 50 are not vigorous enough to work as state police officers. Instead, the state would have the burden of showing that the retirement age *actually* bears a substantial relationship to the articulated goal of providing a more effective police force. Since studies show that there is more variation in ability among workers of the same age group than between workers of different age groups[47] and since the state has the reasonable alternative of continuing yearly physical examinations to achieve its goal of eliminating physically incompetent employees without the harsh result of mothballing able-bodied men, one can infer that the state could not meet the burden of proving that retirement based on chronological age has a fair and substantial relationship to its goal. The instant case indicates that the Court, despite selective application of an intermediate level of scrutiny over the past several terms,[48] is still clinging to the security of the simplistic two-tiered equal protection model. The Court must develop some consistency in its application of the different levels of scrutiny. If not, those who are not afforded the benefit of the new equal protection standard may rightfully feel that the Court's method of review is as discriminatory as the legislation which they seek to challenge.[49] Yet, even if the rational basis test is retained, the instant decision should not require that *all* mandatory retirement laws are per se constitutional. As noted by Justice Marshall in his dissenting opinion,[50] the Court's decision only considered the relationship between aging and physical strength as it relates to the needs of a state policeman. The Court did not review any relation-

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tion of their jobs. Swartz, *Aging Redefined, or the Ravages of Time Debunked*, 27 GERIATRICS 26, 30 (Dec. 1972). Often retired persons cannot obtain adequate health care because they cannot meet spiraling health care costs on a fixed income. 7 SUFFOLK U.L. REV. 917, 927 (1973).

[45] Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2568 (1976).

[46] 404 U.S. 71 (1971). *See* note 25 and accompanying text *supra*. The instant case is analogous to *Reed* in that the ultimate goal of the states in each of the cases was to eliminate the need for a hearing on the merits to determine competency. In *Reed* the purpose of the statutory preference for males over females was to eliminate the need for a hearing to determine which aspirant for the position of administrator was the better qualified. Similarly, the standardized retirement age in the instant case eliminates the need for an examination to determine competency.

[47] Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1316 (1974).

[48] *See* note 28 *supra*.

[49] *See* Nowak, *supra* note 25, at 1122.

[50] Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2573 n.8 (1976) (Marshall, J., dissenting).

ship between aging and mental ability as it relates to the needs of state employees whose jobs do not demand such physical vigor. Since intelligence generally does not decline with age,[51] a challenge to mandatory retirement laws for state officeworkers might be decided differently.[52]

John David Price

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[51] 11 WILLIAMETTE L.J. 398, 402 (1974).

[52] One study of comparative job performance by age concluded that officeworkers 65 years of age or older are as productive as, and in some instances more productive than, younger officeworkers performing the same tasks. STAFF OF SPECIAL SENATE COMM. ON AGING, 93d CONG., 1st SESS., WORKING PAPER ON IMPROVING THE AGE DISCRIMINATION LAW 15 (Comm. Print 1973); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1273, COMPARATIVE JOB PERFORMANCE BY AGE: OFFICE WORKERS 3 (1960).

WILLS—MORTMAIN PROVISIONS CANNOT BE AVOIDED BY DEVISING LAND IN TRUST TO A NON-PROSCRIBED INSTITUTION FOR THE BENEFIT OF A PROSCRIBED INSTITUTION

Mamie Thomas died testate on November 18, 1958, devising, in trust, her entire interest in Chicora Plantation to Union Planters National Bank of Memphis as trustee.[1] Testatrix's will provided[2] that upon termination of the 15-year trust, the res of the trust was to pass to the Methodist Hospital of Memphis.[3] After termination of the trust, Union Planters conveyed the interest in Chicora Plantation to Methodist Hospital.[4] Miss Thomas' heirs[5] subsequently filed suit in the Chancery Court of Yazoo County, Mississippi, to remove Methodist Hospital's claim to Chicora Plantation as a cloud on their title, contending that the

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[1] Item XXII of the will provided in relevant part:

> To the Union Planters National Bank of Memphis, Tennessee as Trustee I make over my 167/216ths interest in Chicora Plantation located about nine miles from Pickens, Mississippi in Yazoo and Holmes Counties of that State. . . . This trust shall continue for the period of fifteen (15) years from the date of my death at which time the trust shall cease and my interest in this farm shall become part of the residue of my estate and pass under the provisions of this will.

Methodist Hosp. v. Slack, 330 So. 2d 882, 886 n.5 (Miss. 1976).

[2] The will, in item XXIII, also provided:

> [S]ubject to the conditions and limitations hereinafter set forth, I offer to make over to the Methodist Hospital of Memphis, Shelby County, Tennessee . . . all the rest, residue and remainder of my estate, real, personal and mixed, wherever located . . . . The conditions and limitations on which this offer is made are as follows:
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> (1) The Methodist Hospital shall have ten (10) years from the date of my death within which to decide whether it will accept my offer . . . . While the Methodist Hospital is given the period of ten (10) years within which to decide whether it will accept my offer, it is not required to wait the full ten years, but may accept my offer at any time it desires within the ten year period after my death.
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> . . . .
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> (2) In the event the Methodist Hospital accepts my offer, then it shall notify my Executors in writing . . . and as of the date of such acceptance my estate is to be valued and the Hospital shall contribute an amount equal to the value of my estate.
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> (3) The entire residue of my estate and the amount to be contributed by the Methodist Hospital . . . shall be used by the Methodist Hospital in the erection and equipping of a hospital building to be devoted to the care of the sick and to the relief of pain and suffering of humanity.

Id. at 886-87 n.6. The hospital accepted the above offer in 1963, matching with $2 million, the then value of the estate. *Id.* at 888.

[3] Methodist Hospital is a general welfare corporation organized under the laws of the State of Tennessee.

[4] 330 So. 2d at 888.

[5] Appellees, Ann Slack, Guy V. Slack, Jr., Gordon Gildart, and Marjorie Nixon, were the testatrix's heirs at law.

mortmain provisions of the Mississippi Constitution[6] and Code[7] prohibited the conveyance to appellant. Overruling the hospital's general demurrer, the chancery court rejected the contention that a devise in trust to a non-proscribed institution for the benefit of a proscribed institution is not within the mortmain provisions. On appeal to the Mississippi Supreme Court, *held*, affirmed. The constitutional and statutory mortmain proscriptions against certain institutions holding land devised to them for more than 10 years cannot be avoided by devising the land in trust to a non-proscribed institution for the benefit of a proscribed institution. *Methodist Hospital v. Slack*, 330 So. 2d 882 (Miss. 1976).

At common law, land was freely alienable to religious organizations[8] with-

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[6] MISS. CONST. art. 14, § 270 (1890), *as amended*, Resolution of January 17 and 18, 1940, ch. 362, [1940] Gen. Laws Miss. 576, provides:

> No person leaving a spouse or child, or descendants of child shall, by will, bequeath or devise more than one-third of his estate to any charitable, religious, educational or civil institutions, to the exclusion of such spouse or child, or descendants of child, and in all cases the will containing such bequest or devise must be executed at least ninety days before the death of the testator, or such bequest or devise shall be void.
>
> Provided, however, that any land devised, not in violation of this section, to any charitable, religious, educational, or civil institution may be legally owned, and further may be held by the devisee for a period of not longer than ten years after such devise becomes effective, during which time such land and improvements thereon shall be taxed as any other land held by any other person, unless exempted by some specific statute.

[7] Although MISS. CODE ANN. § 91-5-31 (1972) adopts the constitutional provision in almost verbatim form, it adds the following provision:

> Provided further, that within said period of ten years during which such land may be held, the charitable, religious, educational, or civil institution holding the same shall have the power and right to sell and convey the said lands so held, or any part thereof; and its deed of conveyance may be treated as passing such title thereto as was possessed by the testator, or the said land, or any part thereof, may be leased for a length of time not extending beyond the expiration of the period during which it may be legally held by the lessor institution. If such land be not sold and disposed of within the said period of ten years, then in that event, at the expiration of the said period of ten years, it shall revert to the heirs at law of the testator under whose will it was devised to the institution holding it, or to the devisees under such will, as the case may be.

[8] "Throughout history the most significant force for charitable giving has been religion . . . ." E. FISCH, D. FREED & E. SCHACHTER, CHARITIES AND CHARITABLE FOUNDATIONS § 19, at 14 (1974). The motives prompting this religious giving, however, have undergone sweeping changes through the years. The basis in the early Christian era was Biblical. *See id.* Thus, the foundations of early Christian giving were the maxims to "love thy neighbour as thyself," *Mark* 12: 31 (King James), and the Golden Rule—"And as ye would that men should do to you, do ye also to them likewise." *Luke* 6: 31 (King James). During the Middle Ages, emphasis shifted to self-interest in that aid to the poor became an effective means of "saving the soul under the Augustinian doctrine that 'alms have power to extinguish and expiate sin.'" E. FISCH, D. FREED & E. SCHACHTER, *supra*, § 19, at 15, *quoting* WARNER, AMERICAN CHARITIES 7 (1908). This self-interest has become even more pronounced today as a result of the sizeable tax savings incurred through inter vivos and testamentary charitable gifts. *See* INT. REV. CODE OF 1954 §§ 170 (income tax), 2055 (estate tax), 2522 (gift tax).

out restrictions on either the quantity or duration of ownership.[9] As a result, large amounts of land in England were possessed by religious organizations at the time of the Norman Conquest,[10] prompting a struggle between church and state.[11] This conflict culminated in the enactment of mortmain statutes to bar religious organizations from acquiring realty.[12] A provision in the Magna Carta[13] is generally recognized as the first of these statutes.[14] Although later statutes permitted religious organizations to acquire title to real property,[15] their ability to retain title was severely restricted.[16] The underlying purpose of these English mortmain provisions was to foreclose a system under which "lands [became] vested in objects endued with perpetuity of duration, [thus depriving] the lords of escheats, and other feudal profits."[17] The English mortmain statutes, however, were never in force as a part of the common law of the United States.[18] Despite this lack of a common law basis, many states, including Mississippi,[19]

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[9] E. FISCH, D. FREED & E. SCHACHTER, *supra* note 8, § 19, at 14.

[10] *Id.* § 19, at 11, *citing* FINLASON, HISTORY OF THE LAW OF MORTMAIN 9 (1853); *see* 4 A. SCOTT, THE LAW OF TRUSTS § 362.1 (3d ed. 1967).

[11] E. FISCH, D. FREED & E. SCHACHTER, *supra* note 8, § 19, at 11.

[12] *Id.* § 19, at 13, *citing* 9 HEN. III ch. 36 (1225); 7 EDW. I ch. 2 (1279); 18 EDW. III, St. 3, ch. 3 (1289); 15 RICH. II ch. 5 (1391).

Various explanations of the derivation of the term mortmain from the Latin *manus mortua* include: (1) the simple fact that bodies corporate never die; (2) the clergy against whom mortmain was directed were treated for legal purposes as dead—"civiliter mortui"; and (3)

> "the lands were said to come to dead-hands as to their lords, for that by alienation in mortmain they lost wholly their escheats, and in effect their knight-services for the defense of the realm, wards, marriages, reliefs and the like; and therefore (it) was called a dead hand, for that a dead hand yieldeth no services."

E. FISCH, D. FREED & E. SCHACHTER, *supra* note 8, § 19, at 13, *quoting* Bodfish, *The Destructive Effect of the 1937 Amendment of Section 42 of the Probate Code of California Upon the Limitations Regarding Testamentary Dispositions to Charity*, 26 CALIF. L. REV. 309, 313 (1938).

[13] 9 HEN. III ch. 36 (1225).

> "It shall not be lawful from henceforth to any to give his Lands to any Religious House, and to take the same Land again to hold of the same House. Nor shall it be lawful to any House of Religion to take the Lands of any, and to lease the same to him of whom he received it. If any from henceforth give his Lands to any Religious House, and thereupon be convict, the gift shall be utterly void, and the Land shall accrue to the Lord of the Fee."

Id., *quoted in* Bodfish, *supra* note 12, at 311.

[14] *Cf.* 37 U. PITT. L. REV. 169, 169 (1975). For a discussion of the history of mortmain, see Bodfish, *supra* note 12, at 311-13.

[15] Bodfish, *supra* note 12, at 311-12, *citing* 7 EDW. I, St. 2 (1279); 13 EDW. I ch. 32 (1285); 18 EDW. I, St. 1, ch. 3 (1290); 27 EDW. I, St. 2 (1298); 34 EDW. I, St. 3 (1306); 18 EDW. III, St. 3, ch. 3 (1344); 15 RICH. II ch. 5 (1391); 23 HEN. VIII ch. 10 (1531); 1 & 2 P. & M. ch. 8 (1554); 17 CAR. II ch. 3 (1665); 7 & 8 WM. III ch. 37 (1696); 2 & 3 ANNE ch. 11 (1703).

[16] E. FISCH, D. FREED & E. SCHACHTER, *supra* note 8, § 19, at 14.

[17] Bodfish, *supra* note 12, at 313, *citing* 2 BL. COMM. 270 (Jones ed. 1915).

[18] 15 AM. JUR. 2D *Charities* § 45, at 53 (1964); 79 *id. Wills* §176, at 404 (1975).

[19] MISS. CODE ANN. § 91-5-31 (1972).

enacted mortmain statutes.[20]

Mortmain first appeared in Mississippi in 1857.[21] Abandoned in 1880,[22] mortmain resurfaced in 1890 in constitutional[23] and statutory[24] form. Operating as a limitation upon testamentary disposition,[25] these provisions remained unchanged until 1940.[26] The purposes of the Mississippi provisions are generally to prevent a testator from being charitable at the expense of his heirs[27] and to

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[20] T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 35, at 135 (2d ed. 1953); 1 W. PAGE, THE LAW OF WILLS § 3.15, at 104-05 (Bowe-Parker ed. 1960); 94 C.J.S. *Wills* § 108, at 831 (1956); *see Restrictions on Charitable Testamentary Gifts*, 5 REAL PROP., PROB. & TR. J. 290, 301-06, Appendix B (1970); 37 U. PITT. L. REV. 169, 169 (1975); 13 WEST. RESERVE L. REV. 579, 579 (1962).

Jurisdictions with mortmain provisions include: *California*—CAL. PROB. CODE §§ 40-43 (West 1956), *repealed*, (Supp. 1976); *District of Columbia*—D.C. CODE ANN. § 18-302 (1973); *Florida*—FLA. STAT. ANN. § 732.803 (1976); *Georgia*—GA. CODE ANN. § 113-107 (1975 ed.); *Idaho*—IDAHO CODE § 15-2-615 (Supp. 1975); *Iowa*—IOWA CODE ANN. § 633.266 (1964); *Mississippi*—MISS. CODE ANN. § 91-5-31 (1972); *Montana*—MONT. REV. CODES ANN. § 91-142 (1947); *New York*—N.Y. EST., POWERS & TRUSTS § 5-3.3 (McKinney 1967), *as amended*, (McKinney Supp. 1975-76); *Ohio*—OHIO REV. CODE ANN. § 2107.06 (Page 1968); *Pennsylvania*—PA. COMP. STAT. ANN. tit. 20, § 2507(1) (1975). For a discussion of the different state provisions, see *Restrictions on Charitable Testamentary Gifts*, *supra*.

[21] Miss. Rev. Code ch. XXXV, § 10, art. 53-56 (1857).

The Code of 1857 permitted religious organizations to hold real property only for a place of worship, a residence for the minister, a seminary, and a female school. *Id.* art. 53. Any land acquired, outright or in trust, for any other purpose was *ipso facto* forfeited to the state. *Id.* art. 55. Furthermore, any devise of lands, in trust or otherwise, *id.* art. 55, or bequest of money or personal property, *id.* art. 56, was null and void. These provisions appeared in the 1871 Code as sections 2438 through 2441. Miss. Rev. Code ch. 55, art. VII, §§ 2438-41 (1871).

[22] The Code of 1880 repealed articles 53 through 55 of the 1857 Code (Miss. Rev. Code ch. 55, art. VII, §§ 2438-40 (1871)), but left article 56 intact. *See* Miss. Rev. Code ch. 38, § 1072 (1880). It would thus appear that although charitable and religious organizations could acquire and own land by testamentary disposition, they could not acquire personalty by any type of testamentary disposition. *Id.*

[23] MISS. CONST. §§ 269-70 (1890), *repealed*, Resolution of January 17 and 18, 1940, ch. 325, [1940] Gen. Laws Miss. 579. Section 269 of the Constitution adopted verbatim, with minor punctuation changes, the language of Mississippi's first mortmain provision. Miss. Rev. Code ch. XXXV, § 10, art. 55 (1857). Section 270 of the Constitution adopted the language of Miss. Rev. Code ch. 38 § 1072 (1880), which had remained unchanged since its adoption as Miss. Rev. Code ch. XXXV, § 10, art. 56 (1857). See note 21 *supra*. The Constitutional provisions are quoted in Methodist Hosp. v. Slack, 330 So. 2d 882, 884 nn.1 & 2 (Miss. 1976).

[24] Miss. Code ch. 145, §§ 4500-01 (1892).

[25] National Bank of Greece v. Savarika, 167 Miss. 571, 596, 148 So. 649, 656 (1933); *see* Mississippi College v. May, 241 Miss. 359, 128 So. 2d 557 (1961) (construing new provisions).

[26] *See* Miss. Code ch. 151, §§ 5090-91 (1906); Miss. Code Ann. §§ 5091-92 (Hemingway's 1917); Miss. Code Ann. §§ 3564-65 (1930), *quoted in* Methodist Hosp. v. Slack, 330 So. 2d 882, 885 nn.3 & 4 (Miss. 1976).

[27] Blackbourn v. Tucker, 72 Miss. 735, 747, 17 So. 737, 739 (1895):

Manifestly, the purpose of the constitution is to prevent one who will not be

inhibit the accumulation of property by religious organizations.[28] Nevertheless, these provisions have been held not to apply to a devise of cash to a charitable trust;[29] to a contract to devise property to a proscribed institution in payment of expenses;[30] and to devises to branches of the state.[31]

In 1940, the Legislature replaced the constitutional[32] and statutory[33] mortmain provisions with new sections.[34] The statutory provision appears in section 91-5-31 of the 1972 Code[35] and merely codifies the constitutional provision with one addition.[36] Both the constitutional and statutory provisions limit charitable testamentary devises in three ways. First, "[n]o person leaving a spouse or child or descendents of a child shall, by will, bequeath or devise more than one

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charitable at his own expense from being so at the expense of his heir at law. One may yet "sell all that he hath, and give to the poor," but he may not keep his gripe on his estate until death relaxes his grasp, and then, at the expense of wife and child, devote it to religious uses.

[28] Greely v. Houston, 148 Miss. 799, 806, 114 So. 740, 743 (1927)("One of the purposes sought to be accomplished by [the mortmain provisions] may be to prevent the accumulation of property in the hands of religious institutions . . . .").

[29] Hailey v. McLaurin's Estate, 112 Miss. 705, 73 So. 727 (1917).

[30] Wright v. Mary Galloway Home for Aged Women, 186 Miss. 197, 187 So. 752 (1939).

[31] In Coleman v. Whipple, 191 Miss. 287, 300-01, 2 So. 2d 566, 569 (1941), the court stated:

> Article 54 of Section X, Code of 1857, made forfeiture to the State the penalty for granting lands or interests therein in mortmain. This statute furnishes a significant transitional link between the old common-law provisions and their establishment as part of our expressed public policy; and their purpose was thus definitely projected into our subsequent enactments. Certainly, since under such section lands so granted were forfeited to the state, there could have been a valid grant direct to the state. So, if under the older statutes there was a forfeiture to the crown of lands devised in mortmain, the public policy or purpose which was crystalized in these statutes did not operate to prevent a valid devise to the crown itself. In the instant case the emphasis is not upon the fact that the purposes are educational and charitable, but upon the status of the legatees. Had these lands been devised direct to appellees, the State would still have remained their ultimate owner and invested with a measure of control and dominion over them. Such dominion is consistent with the inherent rights of the sovereign and the acquired rights of the subject.

Two other Mississippi cases deal with the pre-1940 mortmain provisions: Old Ladies Home Ass'n v. Grubb's Estate, 191 Miss. 250, 199 So. 287 (1940) (devise of land in trust to proscribed organization violates mortmain); Anderson v. Gift, 156 Miss. 736, 126 So. 656 (1930) (violation of mortmain to devote proceeds of sale of land to proscribed institution).

[32] Resolution of January 17 and 18, 1940, ch. 325, [1940] Gen. Laws Miss. 579.

[33] Act of April 26, 1940, ch. 318, [1940] Gen. Laws Miss. 576.

[34] Resolution of January 17 and 18, 1940, ch. 326, [1940] Gen. Laws Miss. 580; Act of April 25, 1940, ch. 318, [1940] Gen. Laws Miss. 576, *codified in* MISS. CODE ANN. § 671 (recompiled 1956); *id.* § 91-5-31 (1972).

[35] MISS. CODE ANN. § 91-5-31 (1972); see note 7 *supra* for the language of the current provision.

[36] See note 7 *supra*.

third of his estate to any" proscribed institution.[37] This proscription applies *only* where the testator leaves a spouse, child, or descendants of a child.[38] Where the devise is over one-third of the testator's estate, the proscribed institution takes only one-third of the estate.[39] Second, the will must be executed at least 90 days before death where *any* bequest or devise is made to a proscribed institution.[40] Again, this limitation applies only where the testator leaves a spouse, child, or descendants of a child.[41] Finally, land devised to a proscribed institution pursuant to the above limitations cannot be held for more than 10 years from the time the devise becomes effective.[42]

The Mississippi Supreme Court, dealing extensively with the 10-year limitation in *Mississippi College v. May*,[43] held that land devised to a proscribed institution can be held no longer than 10 years, regardless of whether the testator

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[37] MISS. CODE ANN. § 91-5-31 (1972).

[38] Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941).

[39] Crosby v. Alton Ochsner Medical Foundation, 276 So. 2d 661 (Miss. 1973)(dictum), *noted in* 44 MISS. L.J. 814 (1973); Mississippi School for the Blind v. Armstrong, 216 Miss. 348, 62 So. 2d 369 (1953).

GA. CODE ANN. § 113-107 (1975) imposes a similar restriction on testamentary dispositions. Gifts in violation of the statute can be attacked only by a wife, child, or descendant of child, *see* Hood v. First Nat'l Bank, 219 Ga. 283, 133 S.E.2d 19 (1963), and an adopted child is not considered a descendant of child. Doughty v. Futch, 219 Ga. 677, 135 S.E.2d 286 (1964). IDAHO CODE § 15-2-615 (Supp. 1975) also imposes a one-third maximum, unless testator bequeaths assets having a value of at least $100,000 to one or more lineal descendants. IOWA CODE ANN. § 633.266 (1964) imposes a maximum of one-fourth, although the devise or bequest is merely voidable and not void. MONT. REV. CODES ANN. § 91-142 (1947) imposes a one-third maximum only if the will in question was executed within 30 days of death. N.Y. EST., POWERS & TRUSTS § 5-3-3 (McKinney Supp. 1975-76) gives certain relatives a right of election where more than one-half of the estate is left to charity. OHIO REV. CODE ANN. § 2107.06 (Page 1968) limits a testator with issue from making a testamentary charitable gift in excess of one-fourth of his estate if the will is executed within 6 months of death.

[40] MISS. CODE ANN. § 91-5-31 (1972).

Other states impose similar time limitations. *See* D.C. CODE ANN. 1 § 18-302 (1973)(30 days); FLA. STAT. ANN. § 732.803 (1976)(6 months); GA. CODE ANN. § 113-107 (1975 ed.)(90 days); IDAHO CODE § 15-2-615 (Supp. 1975)(30 days); MONT. REV. CODES ANN. § 91-142 (1947)(30 days); OHIO REV. CODE ANN. § 2107.06 (Page 1968)(6 months); PA. COMP. STAT. ANN. tit. 20, § 2507 (1) (1975)(30 days).

[41] Crosby v. Alton Ochsner Medical Foundation, 276 So. 2d 661 (Miss. 1973); Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941). The court in *Crosby* held that

> any bequest by any person leaving a spouse or child or descendants of a child of over one-third of testator's estate is void to the extent that it exceeds one-third of the estate and that any will containing a devise of more or less than one-third of the estate must be executed at least ninety days before the death of the testator or such bequest or devise will be void.

Crosby v. Alton Ochsner Medical Foundation, *supra*, at 664.

[42] MISS. CODE ANN. § 91-5-31 (1972).

[43] 235 Miss. 200, 108 So. 2d 703 (1959).

was survived by a spouse, child, or descendant of a child.[44] Additionally, the *May* court held that a bequest or devise to a charitable corporation in trust "for the very purposes for which it is organized" does not prevent operation of the mortmain provisions.[45] Mississippi is currently the only state which imposes such a time limitation on the period a proscribed institution can hold devised land.[46]

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[44] *Id.* at 219, 108 So. 2d at 710. The court stated that the land reverted to the heirs or devisees where the institution held it longer than 10 years.

[45] *Id.* at 216, 108 So. 2d at 709.

> One purpose of Constitution Sec[tion] 270 was to prevent the undue accumulation of excessive quantities of land in the hands of prohibited types of institutions. Since this objective could not be accomplished by the creation of a trust with the institution being the trustee and beneficiary, as the College is here, the purpose of Sec[tion] 270 could and would be effectively nullified . . . .
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> . . . .
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> In brief, although Item IV has terms indicating a trust in the College for the benefit of students at the College obtaining scholarships, the creation of a trust in land to an institution within the prohibition of the Constitution Sec[tion] 270, where the proceeds are to be used for some of the purposes for which the institution was created, does not take the devise out of Sec[tion] 270. The manifest purpose of the Constitution is to the contrary.

Id. at 216-18, 108 So. 2d at 709, 710.

[46] See statutes cited note 20 *supra*; *cf.* E. FISCH, D. FREED & E. SCHACHTER, *supra* note 8, § 471; 94 C.J.S. *Wills* § 108, at 831-32 (1956).

The constitutionality of mortmain provisions has recently been drawn into question. *See In re* Estate of Riley, 329 A.2d 511 (Pa. 1974), *cert. denied*, 421 U.S. 971 (1975); *In re* Estate of Cavill, 329 A.2d 503 (Pa. 1974)(holding the Pennsylvania mortmain statute unconstitutional), *noted in* 80 DICK. L. REV. 152 (1975); 54 N.C.L. REV. 431 (1976); 37 U. PITT. L. REV. 169 (1975).

Mortmain statutes withstood challenge until 1972, 54 N.C.L. REV., *supra*, at 432, and cases cited therein, when a United States district court held the District of Columbia mortmain statute unconstitutional as a denial of freedom of religion. *Id.*, *citing In re* Small, Administration No. 2507-70 (D.D.C., Feb. 7, 1972)(unpublished). The Pennsylvania Supreme Court similarly held Pennsylvania's mortmain provision unconstitutional in *In re* Estate of Cavill, *supra*. The Pennsylvania court, however, based its decision on a fourteenth amendment equal protection analysis. The court found that the mortmain statute "arbitrarily denied to charitable beneficiaries the equal protection of the law." 37 U. PITT. L. REV., *supra*, at 169. The Pennsylvania court struck down the statute on the ground

> that the statute divided testators into two classes: those who provided in their wills for charitable or religious gifts, but died within the thirty-day period; and those who either made no such gifts or did and survived the thirty-day period. Gifts by persons in the first class were voidable at the election of any person who would benefit by their invalidity.

80 DICK. L. REV., *supra*, at 154.

Mortmain statutes can be constitutionally attacked on various grounds. These include: (1) equal protection; (2) freedom of religion; and (3) procedural due process. 54 N.C.L. REV., *supra*, at 437. The due process challenge recognizes that

> the classification is a deprivation of due process; the classification is tantamount to an irrebuttable presumption of undue influence and unprincipled activity by

In the instant decision, Justice Walker, speaking for a unanimous court,[47] stated that since appellant, by accepting the bequest in 1963,[48] became entitled to any profits from the operation of Chicora Plantation, it was evident that the trustee was a mere conduit whose sole purpose was to delay appellant's taking title to the plantation. Consequently, the trust arrangement constituted an invalid attempt to prevent the running of the 10-year mortmain limitation.[49] This analysis was further evinced by finding that: (1) appellant was the sole beneficiary of the trust; (2) appellant was to be the recipient of the trust corpus at the end of 15 years; and (3) the trustee had no power to sell the plantation.[50] The court concluded that one purpose of the mortmain provisions—preventing an undue accumulation of land by certain institutions—would be defeated by allowing the devise of lands "in trust to a non-proscribed institution to be held in excess of ten years for the sole benefit of one or more proscribed institutions."[51]

The purposes of Mississippi's mortmain provisions are to protect the testator's heirs and to bar certain proscribed institutions from accumulating excessive quantities of land.[52] The former purpose is adequately served by Mississippi's present provisions. If a testator leaves heirs of the protected class, he is prohibited from bequeathing or devising more than one-third of his estate to a charitable or religious organization. Similarly, the 90-day requirement prevents a proscribed organization from exerting undue influence on the testator immediately prior to death. Protection of the testator's family, however, is not the only consideration. A person should have the freedom to devise property as he wishes. Moreover, a spouse is protected through the forced share statute.[53] The legislature has made a decision that children are not entitled to that same protection

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> the chartiable beneficiary. The purpose of the summary classification is . . . to relieve individual heirs from the burden of establishing culpable activity or corrupt intent on the part of charitable beneficiaries. The classification fails as a denial of due process not justified by the statutory purpose of circumventing due process of law. Furthermore, in a challenge to the validity of a mortmain statute, employment of the irrebuttable presumption doctrine would permit success without reliance upon a judicial conclusion of capricious classification.

Id. at 438 (footnote omitted).

[47] This case was heard before Chief Justice Gillespie and Justices Walker and Broom and affirmed en banc. Justice Lee took no part in the consideration of this case.

[48] Methodist Hosp. v. Slack, 330 So. 2d 882, 889 (Miss. 1976).

[49] *Id.*

[50] *Id.*

[51] *Id.* The court did not speculate

> as to whether the Hospital could have successfully invoked the aid of a court of equity to have the trust terminated under the theory of equitable approximation since no such effort was made in that respect by the appellant Hospital.

Id. at 889-90.

[52] See notes 27 & 28 and accompanying text *supra*.

[53] MISS. CODE ANN. § 91-5-25 (Supp. 1975) gives a spouse 90 days to renounce a will and take his or her intestate share, up to a maximum of one-half, if the testator left no child or descendant of child. *Id.* § 91-5-27 (1972) provides that no renunciation is necessary if no provision is made for the spouse.

and can, therefore, be effectively disinherited.[54] It is incongruous to provide that a testator can disinherit his children but cannot do so and leave the bulk of his estate to charity—although he can leave it all to the state.[55] Furthermore, the testator can effectively prevent the voided bequest or devise from passing to his family by adding a residuary clause to his will. Also, the one-third maximum imposed by the mortmain provisions prevents large estates from minimizing estate taxes by taking advantage of the available charitable deductions. The second stated purpose of mortmain—preventing the accumulation of real estate by proscribed institutions—is not served by the 10-year ownership proscription. This provision does not foreclose the donee organization from selling the land within the 10-year period and then purchasing similar land which can be held in perpetuity.[56] In the instant decision, for example, the court intimated[57] that had the trust in issue been dissolved, Methodist Hospital could have sold the land.

A further problem with the mortmain provisions discussed by neither the court[58] nor the parties[59] in the present case requires discussion. Although the maximum bequest or devise provision is narrowly drawn in order to achieve its avowed purpose, the 90-day period could well be constitutionally infirm under the equal protection reasoning of the Pennsylvania Supreme Court.[60] Moreover, a probate court in the District of Columbia has held a similar provision unconstitutional as violative of due process.[61] The 10-year limitation on holding land is also unconstitutional under the Pennsylvania court's analysis. Nonproscribed institutions can hold devised land for an indefinite period. Proscribed organizations, however, can hold this same land for only 10 years; this result is reached even though the same organization may retain land acquired as an inter vivos donation without regard to the 10-year limitation. It would thus clearly appear to be an equal protection violation.

Mortmain is an ancient device designed to prevent the church from accumulating land and thus depriving the state of escheats. As such, it is clearly outmoded. The policy considerations[62] underlying Mississippi's current mortmain provisions are also no longer persuasive. The family is adequately protected by the forced share statute without need for the one-third maximum.[63] Similarly, the considerations behind the 90-day requirement are amply served by a traditional undue influence approach.[64] Additionally, the 10-year circum-

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[54] *Cf. id.* § 91-5-5.

[55] See note 31 *supra*.

[56] See note 7 *supra*.

[57] *Cf.* note 51 *supra*.

[58] *See* Methodist Hosp. v. Slack, 330 So. 2d 882 (Miss. 1976).

[59] *See id.*, Brief for Appellant; *id.*, Brief for Appellees; *id.*, Reply Brief for Appellant.

[60] *See In re* Estate of Riley, 329 A.2d 511 (Pa. 1974). See note 46 *supra*.

[61] Doyle v. Key, Administration No. 2188-72 (Super. Ct. D.C., P. Div., Feb. 13, 1975)(irrebuttable presumption of undue influence).

[62] See notes 27 & 28 and accompanying text *supra*.

[63] See note 53 and accompanying text *supra*.

[64] See note 40 and accompanying text *supra*.

scription no longer serves any legitimate purpose; it can easily be avoided and does not preclude eleemosynary corporations from accumulating realty. Perhaps valuable at its inception, the mortmain concept is now an antiquated device that has long outlived its usefulness.

Frank J. Hammond III

CONSTITUTIONAL LAW—FEDERAL HABEAS CORPUS COLLATERAL REVIEW OF STATE CONVICTIONS—SEARCH AND SEIZURE CLAIMS NOT COGNIZABLE AFTER EXHAUSTION OF STATE REMEDIES

Lloyd Charles Powell, a state prisoner convicted of murder, petitioned for federal habeas corpus relief under 28 U.S.C. § 2254,[1] alleging that his conviction was based partially upon inadmissible evidence obtained during a search incident to an unlawful arrest.[2] The United States District Court for the Northern District of California, denying the petition, held that "the arresting officer had probable cause," that "even if the . . . ordinance was unconstitutional," the exclusion of evidence derived from an otherwise valid arrest is not required, and, in the alternative, that any resulting error was harmless.[3] The United States Court of Appeals for the Ninth Circuit reversed, adopting the prisoner's position.[4] On writ of certiorari the United States Supreme Court, *held*, reversed. Where the state affords a prisoner an opportunity to fully adjudicate a fourth amendment claim, federal habeas corpus relief is not available on the ground

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[1] 28 U.S.C. § 2254 (1970) provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constituion or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

[2] Powell was arrested under a Henderson, Nevada, vagrancy ordinance which he argued was unconstitutionally vague. The ensuing search produced a revolver later identified as the weapon used in the murder of which Powell was accused. Despite his contention that it was the fruit of an illegal search, the revolver was admitted into evidence and formed the basis of Powell's murder conviction. In affirming the conviction, the court of appeals characterized as harmless any error committed in admitting testimony concerning the revolver and did not rule on the search's constitutionality. Stone v. Powell, 96 S. Ct. 3037, 3039-40 (1976).

[3] *Id.* at 3040.

[4] Powell v. Stone, 507 F.2d 93, 95-97 (1974), *rev'd*, 96 S. Ct. 3037 (1976). The court of appeals declared the vagrancy ordinance unconstitutional as violative of due process and probable cause standards. The court opined that the exclusionary rule would deter legislators from enacting similar statutes and would preserve the "imperative of judicial integrity." Finally, the court ruled that the error could not be viewed as harmless since the state failed to prove beyond a reasonable doubt that the challenged evidence did not contribute to the conviction. 507 F.2d at 98-99.

that evidence obtained in an unconstitutional search and seizure was introduced at his trial. *Stone v. Powell*, 96 S. Ct. 3037 (1976).

The Judiciary Act of 1789[5] initially empowered the federal courts to entertain habeas corpus appeals.[6] This general habeas corpus grant, however, restricted use of the writ to prisoners "in custody, under or by colour of the authority of the United States."[7] The narrow scope of habeas corpus review was circumscribed further in E*x parte Watkins*.[8] In *Watkins*, the Court effectively limited habeas corpus review to a scrutiny of the sentencing tribunal's jurisdiction by holding the writ unavailable to review convictions by a court of competent jurisdiction.[9] Within the "review-of-jurisdiction" limitation imposed by *Watkins*, the Court subsequently expanded the writ by reversing a conviction based on an unconstitutional statute[10] and by freeing a prisoner incarcerated pursuant to an illegally imposed sentence.[11] In 1867, Congress extended the writ's availability to state as well as federal prisoners and authorized relief in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[12] Despite this legislative expansion, the writ was still judicially limited to a determination of whether the federal question was resolved by a court of competent jurisdiction.[13] For example, in *Frank v. Mangum*,[14] the Court denied habeas corpus review to a state prisoner because his claim had been properly adjudicated by a competent court. The *Mangum* Court, however, did recognize, *obiter dictum*, that a habeas corpus court was not limited merely to reviewing the sentencing tribunal's jurisdiction[15] but might review the adjudication of a state prisoner's federal claim.[16] This position subsequently was reaffirmed,[17] and in *Waley v.*

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[5] Judiciary Act of 1789, ch. 20, 1 Stat. 23.

[6] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

[7] *Id.* at 82.

[8] 28 U.S. (3 Pet.) 193 (1830).

[9] *Id.* at 202-03, 209; *see* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963).

[10] In Ex parte Siebold, 100 U.S. 371 (1879), certain Baltimore judges sought habeas relief following their convictions for voting offenses. The Court held that since the defendants were indicted under unconstitutional laws, their convictions were unconstitutional because the circuit court never acquired jurisdiction. *Id.* at 376-77.

[11] The defendant in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), had been sentenced to suffer a fine *and* imprisonment under a statute authorizing the imposition of a fine *or* imprisonment. The Court granted relief, holding that the trial court was without jurisdiction to impose any sentence beyond the statutory authorization. *Id.* at 175-76.

[12] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[13] Bator, *supra* note 9, at 483.

[14] 237 U.S. 309, 314 (1915) (defendant appealed murder conviction by court of competent jurisdiction alleging that hostile public sentiment influenced trial and that rendering a verdict in his absence interfered with his rights).

[15] *Id.* at 331, 336.

[16] *Id.* at 334-35; Bator, *supra* note 9, at 486-87.

[17] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (federal habeas court ordered to determine if accused waived sixth amendment right to counsel); Moore v. Dempsey, 261 U.S.

Johnston,[18] the Court finally abandoned the fictitious jurisdictional review limitation. Over a decade later, the Court, in *Brown v. Allen*,[19] attempted to clarify its position on the rehearing of constitutional claims previously afforded an apparently adequate corrective process by the state.[20] Eschewing definitive guidelines, the Court placed the grant or denial of a rehearing on the merits within the sound discretion of the district court judge.[21]

While the substantive scope of habeas corpus review steadily expanded, a procedural restriction was interposed. This restriction, affirmed by the Supreme Court in *Ex parte Hawk*,[22] required the federal habeas corpus petitioner to exhaust all available state remedies before federal review would be granted. Although Congress eventually imposed the exhaustion requirement as a matter of statute,[23] it has not had a debilitating prophylactic effect on the habeas corpus petitioner's access to a federal forum. Indeed, in *Fay v. Noia*,[24] the Supreme Court characterized the requirement as a discretionary, flexible rule, which yields to " 'exceptional circumstances.' "[25] While this procedural limitation was developing and the substantive scope of habeas corpus review was expanding, the Court failed to indicate whether a limitation would be imposed upon the type of constitutional claim subject to collateral attack in a habeas corpus tribunal.[26] Perhaps inevitably, however, the Supreme Court in *Townsend v. Sain*[27] recognized that *Brown* had provided inadequate guidelines to govern review[28] and catalogued six specific situations mandating federal habeas corpus review.[29]

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86 (1923) (federal habeas judge ordered to make independent determination of merits). *See generally* Bator, *supra* note 9, at 483-93; Hart, *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 83, 105 (1959); Comment, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1050-54 (1970).

[18] 316 U.S. 101 (1942). The Court expressly acknowledged that the writ was available to consider the constitutionality of conviction as well as the sentencing court's jurisdiction. *Id.* at 104-05.

[19] 344 U.S. 443 (1953).

[20] *Id.* at 465-87; *see* Comment, *supra* note 17, at 1056.

[21] 344 U.S. at 460-65.

[22] 321 U.S. 114, 116 (1944); *see* Daniels v. Allen, 344 U.S. 443 (1953); *cf.* Darr v. Burford, 339 U.S. 200 (1949); Sunal v. Large, 332 U.S. 174 (1947). In *Daniels*, petitioners had been convicted of murder and sentenced to death. Considering that their appeal to the state supreme court was filed too late to be heard, the Court sustained the habeas corpus court's dismissal for lack of jurisdiction. 344 U.S. at 485-87.

[23] 28 U.S.C. § 2254(b), (c) (1970).

[24] 372 U.S. 391 (1963). In *Fay*, a state prisoner had instituted habeas corpus proceedings to set aside a conviction allegedly obtained upon a coerced confession. Petitioner's co-defendants had appealed and gained reversals of similar convictions. Although petitioner had not appealed, the Court ruled that his petition should have been reviewed. *Id.* at 426.

[25] *Id.* at 426.

[26] Bator, *supra* note 9, at 500.

[27] 372 U.S. 293 (1963).

[28] *Id.* at 312. See Comment, *supra* note 17, at 1122.

[29] The federal court must grant habeas corpus review if:

In *Kaufman v. United States*,[30] a federal habeas corpus court had relitigated a federal prisoner's search and seizure claims, an area previously considered by the lower federal courts as improper for habeas review.[31] Adopting the view of a minority of the lower federal courts,[32] the *Kaufman* Court rejected the government's contention that, in a habeas corpus context, fourth amendment search and seizure claims differ from claims under the fifth or sixth amendments.[33] In authorizing use of the rule, the Court reasoned that since the federal habeas remedy extends to state prisoners advancing illegal search and seizure claims,[34] it also should extend to federal prisoners.[35]

The search and seizure claims referred to in *Kaufman* are based upon the fourth amendment guarantee of "the right of the people to be secure in their homes and persons."[36] The basis for this fourth amendment right was the common law protection extended to private possessions and papers.[37] This common law protection, however, guarded merely against abuses inherent in the uninhibited general authority granted under the writs of assistance in the Colonies and the general warrant in England to search for evidence of certain unlawful acts.[38]

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(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. For a codification of these and other circumstances rendering habeas corpus review proper, see 28 U.S.C. § 2254(d)(1)-(8)(1970).

[30] 394 U.S. 217 (1966).

[31] *Id.* at 220 & n.3, *citing* United States v. Re, 372 F.2d 641 (2d Cir. 1967); De Welles v. United States, 372 F.2d 67 (7th Cir. 1967); Eisner v. United States, 351 F.2d 55 (6th Cir. 1965); Armstead v. United States, 318 F.2d 725 (5th Cir. 1963); Williams v. United States, 307 F.2d 366 (9th Cir. 1962); United States v. Jenkins, 281 F.2d 193 (3d Cir. 1960).

[32] 394 U.S. at 220-21 & n.4, *citing* United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963).

[33] Mr. Justice Black, however, agreed with the government's contentions and explained:

> A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

394 U.S. at 237 (Black, J., dissenting).

[34] *E.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Carafas v. Lavallee, 391 U.S. 234 (1968); Worden v. Hayden, 387 U.S. 294 (1967).

[35] 394 U.S. at 225-27 (dictum).

[36] U.S. CONST. amend. IV.

[37] *See* Stanford v. Texas, 379 U.S. 476, 481-85 (1965), *citing* Frank v. Maryland, 359 U.S. 360, 363-65 (1959); Entick v. Carrington, 19 Howell's St. Trials 1029, 95 Eng. Rep. 807 (C.P. 1765).

[38] Stanford v. Texas, 379 U.S. 476, 481 (1965).

Further protection of such documents was afforded in *Boyd v. United States*.[39] In *Boyd*, the Court held that the compulsory production of private books and papers for introduction against the owner at trial violated the fourth and fifth amendments.[40] The present concept of excluding illegally seized evidence was first applied in *Weeks v. United States*,[41] where the Supreme Court reversed a conviction based upon the introduction of evidence admittedly seized by federal officers without a warrant.[42] Subsequently, the distinction between the common law motion to return illegally seized evidence before trial and a motion to suppress such evidence during trial was rejected.[43] In *Wolf v. Colorado*,[44] the fourth amendment right against unreasonable search and seizure was deemed applicable to the states through the fourteenth amendment. The Court, however, refrained from ordaining the exclusionary rule as the exclusive method of effectuating the fourth amendment right and allowed the states to employ any effective method.[45] The states' leeway, however, was gradually reduced[46] and was finally eliminated in *Mapp v. Ohio*,[47] where the exclusionary rule was found fully applicable to state criminal trials.[48] In *Mapp*, the Court indicated that the exclusionary rule's primary purposes are its "deterrence effect"[49] and the "imperative of judicial integrity."[50] Recent cases have endorsed the deterrent aspect as the main purpose of the exclusionary rule,[51] thus setting the stage for retrac-

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[39] 116 U.S. 616 (1886).

[40] *Id.* at 621-22; *see* Oaks, *Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1967).

[41] 232 U.S. 383 (1914).

[42] *Id.* at 398. Although *Weeks* held that a failure to return evidence illegally seized by a *federal* officer was a constitutional violation, the Court indicated that such was not the case when property was seized by *state* officials. *Id.* This distinction, later characterized as the "silver platter" doctrine, Lustig v. United States, 338 U.S. 74, 79 (1948), was discarded in Elkins v. United States, 364 U.S. 206, 208 (1960).

[43] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); *see* Geller, *Enforcing the Fourth Amendment*, 1975 WASH. U.L.Q. 621, 627 (1975).

[44] 338 U.S. 25 (1949).

[45] *Id.* at 28-33.

[46] *See, e.g.*, Elkins v. United States, 364 U.S. 206, 208 (1960); Rochin v. California, 342 U.S. 165, 166-74 (1952).

[47] 367 U.S. 643 (1961).

[48] *Id.* at 655.

[49] *Id.* at 658; *see* Geller, *supra* note 43, at 631.

[50] 367 U.S. at 659. In this context, the Court stated that

> [b]ecause the government teaches everyone by its example, it has a duty to obey and honor the law. To say that in criminal justice the end justifies the means, that is, to say that the government may break the law to sustain in a conviction, invites everyone to disregard the law and become a law unto himself; it would invite anarchy.

Id., *quoting* Elkins v. United States, 364 U.S. 206, 222-23 (1960).

[51] *See, e.g.*, United States v. Peltier, 422 U.S. 531, 542 (1975)(no retroactive application of exclusionary rule without knowledge by law enforcement officer that search was unconstitutional); United States v. Calandra, 414 U.S. 338, 349-53 (1974)(grand jury witness may not refuse to testify on ground that evidence presented is the product of

tion of the rule where the deterrent purpose is not furthered.[52]

In the instant case, the Court reasoned that since the primary purpose of the exclusionary rule is to deter illegal search and seizure, the rule should not be circumscribed without weighing its utility against the costs of its application.[53] The Court emphasized that since the exclusionary rule diverts the focus of the trial and the juror's thoughts from the question of guilt or innocence, and since the evidence excluded is usually reliable and often determinative of culpability,[54] the application of the rule diverts the trial from its factfinding purpose and frequently frees the guilty. If resulting from a minor police error, such a windfall for a guilty defendant is an affront to the essential judicial concept of proportionality, *i.e.* the idea that the remedy should reflect the degree of seriousness of the offense.[55] Despite the fact that the rule's application might breed disrespect for the judicial system, the Court maintained that the exclusionary rule should be utilized at trial and enforced on direct appeal because law enforcement officials consequently might be deterred from violating fourth amendment rights and eventually might adopt fourth amendment values.[56] Employing the rule in a federal habeas corpus proceeding, however, would enhance neither the deterrent effect nor the adoption of fourth amendment ideals. Therefore, the Court reasoned that any benefit to be gained by federal habeas corpus review of state prisoners' fourth amendment claims would be outweighed by the concomitant costs to the criminal justice system. Consequently, the Court held that federal habeas corpus relief is unavailable whenever a state provides a forum for the adjudication of fourth amendment claims.[57]

In a concurring opinion, Mr. Chief Justice Burger noted that the exclusionary rule, as envisioned by *Weeks*, was intended to protect private papers and possessions and not proofs of guilt such as burglar's tools.[58] He further reasoned that the bar against the introduction of reliable evidence, usually consisting of illegally possessed articles, represents an unfortunate departure from the rule's

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unconstitutional search and seizure); Terry v. Ohio, 392 U.S. 1, 28-29 (1968)(admission of evidence seized by experienced police officer during stop and frisk not unconstitutional).

[52] *E.g.*, United States v. Peltier, 422 U.S. 531, 542 (1975); United States v. Calandra, 414 U.S. 338, 347-48 (1974); Linkletter v. Walker, 381 U.S. 618, 637 (1965). Other cases, however, have extended the rule in certain areas. *E.g.*, Gerstein v. Pugh, 420 U.S. 103, 119 (1975)(restriction of the proposition that proceedings need not stop when the person of the defendant is unconstitutionally seized); Alderman v. United States, 394 U.S. 165, 171-76 (1969)(removed standing limitation as a restraint to objection to unconstitutional evidence); Henry v. Mississippi, 379 U.S. 443, 448-50 (1965)(exclusion of unconstitutionally seized evidence despite lack of objection).

[53] Stone v. Powell, 96 S. Ct. 3037, 3050 (1976).

[54] *Id.*, *quoting* Kaufman v. United States, 394 U.S. 217, 237 (1969)(Black, J., dissenting); *see* note 30 *supra*.

[55] 96 S. Ct. at 3050 & n.29.

[56] *Id.* at 3051-52.

[57] *Id.* at 3051.

[58] *Id.* at 3053 (Burger, C.J., concurring).

original purpose.[59] Also, since the rule is often applied in the face of good faith efforts by law enforcement officials, it represents an indirect and clumsy mode of deterrence. Finally, the Chief Justice noted that since the rule's supporters can muster no empirical evidence to support its existence or extension, and since no suitable alternatives are likely to be created or accepted while the present rule is in force, the only solution is "to modify . . . the rule's reach, even if it is retained for a small and limited category of cases."[60]

In a lengthy and vigorous dissent, Mr. Justice Brennan, joined by Mr. Justice Marshall, attacked the majority opinion on several grounds.[61] First, he noted that if grounded upon constitutional principles, the majority opinion must be based on either a finding that petitioner's incarceration does not violate the Constitution or federal statutes, or that considerations of orderly justice and comity enable the Court to redraft jurisdictional statutes.[62] According to the dissent, neither alternative is plausible; the first is illogical, and the second is a usurpation of Congressional power. Mr. Justice Brennan found the first alternative illogical because the admission of evidence seized in an unconstitutional search is per se constitutional error.[63] Furthermore, the Court's assertion that a state prisoner could ultimately petition the Supreme Court for certiorari and the Court's denial of habeas relief are irreconciliable since constitutional violations under *Mapp* do not disappear after state appellate review.[64] Maintaining that the majority found habeas relief unnecessary for a "non-'guilt-related' constitutional violation,"[65] the dissenters concluded that no precedent exists to distinguish constitutional violations heard on a habeas corpus petition and that the decision could result in a "substantial evisceration of federal habeas corpus jurisdiction."[66]

The Court in the present case employed a balancing test to weigh the deterrent effect of the exclusionary rule in habeas corpus review against the societal costs imposed by its application. Although the Court recognized that there may be some deterrent effect at trial and on direct appeal, it realized, in the face of growing criticism,[67] that the exclusionary rule's value on habeas corpus review is almost nil.[68] A reversal imposed years after conviction imposes

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[59] *Id.* at 3053-54.

[60] *Id.* at 3052.

[61] *Id.* at 3055-71 (Brennan, J., dissenting).

[62] *Id.* at 3056-61.

[63] *Id.* at 3056-57.

[64] *Id.* at 3059-61.

[65] *Id.* at 3065.

[66] *Id.* at 3056. In a separate dissent, Mr. Justice White agreed that the petitions should not be dismissed but indicated substantial dissatisfaction with the present rule. *Id.* at 3071-74 (White, J., dissenting).

[67] *See* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 412-24 (1971)(Burger, C.J., dissenting); Oaks, *supra* note 40; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243, 277 (1973). These exhaustive studies indicate that the deterrent effect of the exclusionary rule is at best questionable.

[68] See authorities cited note 67 *supra* for analysis of the exclusionary rule's deterrent effect.

no truly adequate sanction against illegal police activity. Also, the societal costs of a habeas corpus proceeding are high since, in addition to freeing guilty defendants and punishing good faith actions by police, the availability of collateral review extends the time at which judgment becomes final.[69] These practical considerations adequately support the Court's decision. Nevertheless, as with any balancing decision, admittedly sound principles are damaged when rejected in favor of other more important considerations. One of these principles is the concept of judicial integrity.[70] Under the present decision, collateral attack of a state court decision in a federal forum is eliminated in certain instances despite the allegation of a fourth amendment violation. Does this mean that an alleged constitutional violation simply ceases to exist after a full and fair adjudication in state court and a denial of certiorari? Perhaps the majority considers fourth amendment rights to be second class constitutional rights not meriting the full review granted fifth or sixth amendment rights.[71]

Consistent with recent trends,[72] the instant decision restricts the collateral attack of fourth amendment transgressions but does not affect the exclusionary rule's application in substantive areas or its use on direct appeal. By merely disallowing resort to federal habeas corpus appeal in certain instances, the Court's decision does not overrule the *Mapp v. Ohio*[73] requirement which excludes unconstitutionally obtained evidence in a state trial. Nor does it necessarily prohibit enforcement of the exclusionary rule on direct appeal. Narrowly construed, the instant case simply denies the availability of an additional appeal after the state prisoner has received a full and fair state court hearing both on direct and habeas corpus appeal. The majority, however, does expressly reject dictum in *Kaufman v. United States*[74] to the extent that 28 U.S.C. § 2254 allows federal habeas corpus appeal on any constitutional issue regardless of judicially imposed limitations.[75] The instant case may not put the exclusionary rule in imminent danger of total extinction, but it may well diminish its application. Despite an intense dissatisfaction with the rule, the Court has opted to indirectly limit it by restricting the rule's application on habeas corpus review rather than directly limiting or eliminating it completely. In light of recent

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[69] 96 S. Ct. at 3051.

[70] *See* note 50 *supra*.

[71] 96 S. Ct. at 3044.

[72] *See, e.g.*, United States v. Martinez-Fuerte, 96 S. Ct. 3074, 3082-85 (1976)(fourth amendment not violated by border patrol's routine warrantless stopping of vehicles at permanent immigration checkpoint operated north of Mexican border); United States v. Janis, 96 S. Ct. 3021, 3029-35 (1976)(evidence wrongfully seized by state police in criminal law enforcement held admissible in federal civil proceeding brought by United States government); Francis v. Henderson, 96 S. Ct. 1708 (1976)(state prisoner who failed to challenge grand jury composition within time prescribed by state law barred from challenging grand jury through federal habeas corpus absent showing of cause and actual prejudice).

[73] 367 U.S. 643 (1961).

[74] 394 U.S. 217 (1969).

[75] 96 S. Ct. at 3045 & n.16.

cases,[76] it seems likely that the absence of a proven substitute will preclude a complete abrogation of the rule within the near future. Instead, the Court may choose to continue limiting the exclusionary rule by indirect means and wait for Congress to enact a truly effective deterrent procedure.[77]

R. Wilson Montjoy II

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[76] *See, e.g.*, United States v. Janis, 96 S. Ct. 3021 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974).

[77] *See generally* Geller, *supra* note 43, at 684-722 (suggestions include substitution of a tort remedy against the officer violating the fourth amendment and limitation of the rule's application to instances of search and seizure lacking good faith).

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